SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 130

CHRISTINE SNIADACH,
PETITIONER,

—v.—

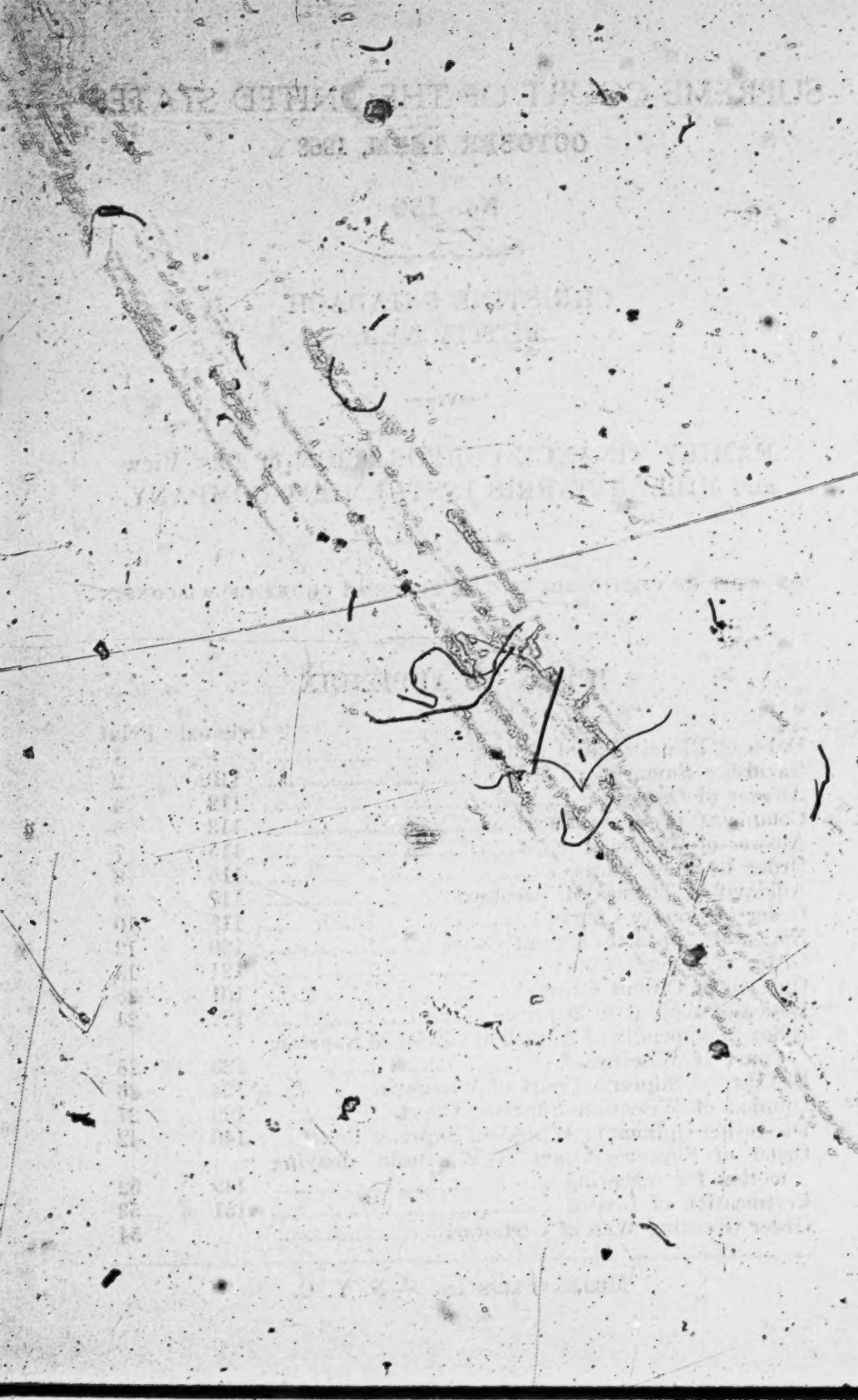
FAMILY FINANCE CORPORATION of Bay View and MILLER HARRIS INSTRUMENT COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

INDEX TO APPENDIX

	Original	Print
Dates of Pleadings and Orders		1
Garnishee Summons	110	2
Answer of Garnishee	112	4
Complaint in Garnishment	113	5
Answer of Garnishee	115	7
Order to Show Cause	116	8
Affidavit of Thomas M. Jacobson	117	9
Order of County Court	118	10
Notice of Appeal to Circuit Court	120	12
Order of Circuit Court	121	13
Opinion of Circuit Court	101	26
Notice of Appeal to Supreme Court	122	24
Index to Appendix of Appellant's Brief in Supreme Court of Wisconsin	123	25
Decision of Supreme Court of Wisconsin	124	26
Opinion of Wisconsin Supreme Court	126	27
Dissenting Opinion in Wisconsin Supreme Court	140	42
Order of Supreme Court of Wisconsin, denying motion for rehearing	149	52
Certification of Record	151	53
Order Granting Writ of Certiorari		54

MEILEN PRESS INC. — N. Y. C.



Dates of Pleadings and Orders

DATE	
11/16/66	Complaint in Garnishment filed.
11/21/66	Garnishee summons filed.
11/22/66	Answer of Garnishee filed.
11/23/66	Order to Show Cause entered.
1/ 3/67	Hearing held in County Court.
1/ 7/67	Order entered by County Court.
1/ 9/67	Notice of Appeal filed.
4/ 4/67	Order entered by Circuit Court.
4/18/67	Notice of Appeal filed.
12/ 8/67	Order entered by Supreme Court of Wisconsin.
12/27/67	Motion for rehearing filed.
2/27/68	Motion for rehearing denied.
5/27/68	Petition for Writ of Certiorari filed.
2/24/69	Certiorari Granted.

GARNISHEE SUMMONS
(Formal Parts Omitted)

Case No. A-1058
Small Claims Branch - Civil Division

THE STATE OF WISCONSIN, To said garnishee:

You are hereby summoned, as garnishee of the defendant, and required to be and appear before the County Court of Milwaukee County, in the City of Milwaukee, Room 411 of said Courthouse at 9 o'clock A.M. on the 6th day of December, 1966, to answer, whether you are indebted to or have in your possession or under your control any

property belonging to said defendant. You are hereby ordered to retain such property pending the further order of the Court.

You are further required to mail a copy of your answer, for filing, to the Clerk of Courts, at the Courthouse, in the County of Milwaukee, and also mail a copy to plaintiff's attorney; and in case of your failure so to do, judgment will be rendered against you for the amount of plaintiff's judgment against said defendant, and costs, of which the said defendant will also take notice.

If wages or salary are the subject matter of this garnishment action, you are required as provided in s. 272.18 (15) (e) of Wis. Statutes to pay over to the principal defendant, on the date when the wages or salary subject to the garnishment action is normally payable, a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in case of an individual with dependents, but in no event in excess of 50 per cent of the wages or salary owing.

Dated this 21st day of November, 1966

FRANCIS X. McCORMACK
Clerk of Circuit and County Courts,
Milwaukee County, Wis.

By Marvin J. Kopitzke
Chief Deputy Clerk of County Court,
Milwaukee County, Wis.

SEAL

SHELDON D. FRANK
Plaintiff's Attorney
135 West Wells Street
Address

Page of Record

4

ANSWER OF GARNISHEE: FOR WAGES, SALARY OR OTHER MONEYS DUE AND OWING.

Milwaukee County Court, Civil Division, Courthouse, State of Wisconsin

FAMILY FINANCE CORP. OF BAY VIEW
Plaintiff
CHRISTINE SNIADACH, alias
Defendant
MILLER HARRIS INSTRUMENT CO.
Garnishee
Return Date 11/29/66

STATE OF WISCONSIN)
) ss.
Milwaukee County)

_____ being first duly sworn, on oath deposes and says that he is the _____ (official title) of the garnishee, in the above entitled action, and that he knows of his own knowledge that the garnishee has, wages, salary or other moneys, in his possession or control belonging to _____ (defendant) in the sum of $_____ and further that garnishee will pay from that amount $_____ as a subsistence allowance, and will hold the balance of $_____ for the further order of the court.

Subscribed and sworn to before me
this ____ day of _____

_____
Notary Public, Milwaukee County, Wisconsin

7 COMPLAINT IN GARNISHMENT
(Formal Parts Omitted)

The plaintiff .... in the above entitled action, by SHELDON D. FRANK, attorney, allege.... as follows, to wit: That a summons has been issued in action by the above named plaintiff.... against above named defendant..... that judgment has not yet been entered therein; that said action is one to recover damages founded upon a promissory note; that the amount of the plaintiff.... claim against the said defendant.... is $420.00 ..... Dollars above all offset.

* * *

That plaintiff believes that Miller Harris Instrument Co. is indebted to or has property, to-wit: Money credits or effects in its possession or under its control belonging to the defendant Christine Sniadach, alias and that such indebtedness, property, money, credits, or effects herein mentioned, are to the best of plaintiff's knowledge and belief, not by law exempt from sale or execution, or any provisional or final process issued from any court or any proceedings in aid thereof.

Wherefore plaintiff.....demands judgment against defendant.....in the sum of $420.00 together with costs and disbursements of this action, and further, plaintiff.....demands that the garnishee defendant.....be ordered to hold any property in its possession or under its control belonging to said defendant.....until further order of the Court, or judgment against the garnishee defendant.....upon..... failure so to do.

SHELDON D. FRANK
Attorney for Plaintiff
135 West Wells Street
Milwaukee, Wisconsin 53203
Phone: 276-3787

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

SHELDON D. FRANK, being first duly sworn on oath says:

* * *

That he is the attorney for the plaintiff..... in the above entitled action.

* * *

B. That the action or defense is founded upon a written instrument in affiant's possession.

* * *

That he has read the foregoing complaint and knows the contents thereof and that same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, as to those matters he believes to be true.

/s/ Sheldon D. Frank
Sheldon D. Frank

Subscribed and sworn to before me this 16th day of November, 1966.

/s/ Carol Lynn Kwiatkowski
Notary Public, Milwaukee County, Wisconsin.

8 ANSWER OF GARNISHEE: FOR WAGES, SALARY OR OTHER MONEYS DUE AND OWING.

Milwaukee County Court, Civil Division, Courthouse, State of Wisconsin

704-310

FAMILY FINANCE CORP. OF BAY VIEW
Plaintiff

CHRISTINE SNIADACH, alias
Defendant

MILLER HARRIS INSTRUMENT CO.
Garnishee

Return Date 12/6

STATE OF WISCONSIN)
) ss.
Milwaukee County)

John Oster III being first duly sworn, on oath deposes and says that he is the President (official title) of the garnishee, in the above entitled action, and that he knows of his own knowledge that the garnishee has, wages, salary or other moneys, in his possession or control belonging to Christine Sniadach, in the sum of $63.18 and further that garnishee will pay from that amount $31.59 as a subsistence allowance, and will hold the balance of $31.59 for the further order of the court.

Subscribed and sworn to before me
this 22 day of November, 1966.
/s/
Notary Public, Milwaukee County, Wisconsin
My Commission Exp. 5/21/67

/s/ John Oster III, President

APPENDIX A

Order to Show Cause

(Formal Parts Omitted)

Upon the Affidavit hereto annexed and upon all the records, files and proceedings had and on motion of Barbee & Jacobson, defendant's attorneys;

IT IS ORDERED, that the above named plaintiff, Family Finance Corporation of Bay View appear before the Honorable Thaddeus J. Pruss, County Judge in and for Milwaukee County, Room 403, in the Courthouse, at 901 North 9th Street, City of Milwaukee, County of Milwaukee, State of Wisconsin, on the 3rd day of January, 1967, at 9:00 o'clock A.M. or as soon thereafter as counsel can be heard to show cause why the garnishment proceedings in the above matter should not be dismissed on the merits for violating defendant's rights under the Wisconsin Constitution, Article 1, Section 9; and further defendant's due process and equal protection rights under the United States Constitution 14th Amendment.

IT IS FURTHER ORDERED, that a copy of this Order to Show Cause, together with a copy of the Affidavit hereto annexed, be served upon the above named plaintiff at least 48 hours prior to the time set for hearing herein.

Dated at Milwaukee, Wisconsin, this 23rd day of December, 1966.

/s/ T. J. PRUSS
County Judge

Affidavit of Thomas M. Jacobson

STATE OF WISCONSIN,
COUNTY OF MILWAUKEE, *ss.*:

THOMAS M. JACOBSON, being first duly sworn on oath deposes and says:

1. That on the 21st day of November, 1966 the plaintiff commenced an original action and garnishment proceedings against the defendant herein;

2. That plaintiff as a result of said garnishment action against defendant is responsible for the garnishee defendant in said matter holding $31.59 due defendant for wages;

3. That plaintiff has not legally established that defendant in fact owes plaintiff any amount of money nor reduced said claim to a valid judgment.

That the defendant's attorney makes this affidavit for the purpose of obtaining an Order directing the plaintiff to show cause why the garnishment action in the instant proceedings should not be dismissed for being in violation of defendant's constitutional rights under the Wisconsin Constitution, Article 1, Section 9 and the United States Constitution, 14th Amendment in that defendant is being deprived of her property without due process of law and further Wisconsin Statutes Chapter 267 permitting garnishment before judgment of a wage earner's salary treats said class unequally in comparison to other individuals similarly situated; that for said reason your Affiant asks the Court to declare Wisconsin's garnishment law before judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 unconstitutional for the aforesaid reasons.

/s/ THOMAS M. JACOBSON
THOMAS M. JACOBSON

Order of County Court

(Formal Parts Omitted)

WHEREFORE an Order to Show Cause returnable before the Honorable Thaddeus J. Pruss of the County Court requiring the plaintiff to show cause why the garnishment proceedings in the above matter should not be dismissed on the merits for violating the defendant's rights under the Wisconsin Constitution, Article 1, Section 9 and further defendant's due process and equal protection rights under the United States Constitution 14th Amendment was signed by the Honorable Thaddeus J. Pruss December 23, 1966;

WHEREFORE Affidavit of defendant's counsel attached thereto indicated plaintiff commenced an original action and garnishment proceeding against defendant herein and pursuant thereto the garnishee defendant held $31.59 due defendant for wages;

WHEREFORE Affidavit of defendant's counsel attached thereto further indicated plaintiff had not legally established that defendant in fact owed plaintiff any amount of money nor reduced said claim to a valid judgment therefore defendant attorney's affidavit requested the Court to Order the plaintiff to show cause why the garnishment action in the instant proceedings should not be dismissed for being in violation of defendant's constitutional rights under the Wisconsin Constitution, Article 1, Section 9 and the United States Constitution, 14th Amendment in that defendant is being deprived of her property without due process of law and further Wisconsin's Statutes Chapter 267 permitting garnishment before judgment of a wage earner's salary treats said class unequally in comparison to other individuals similarly situated; that for said reason your Affiant asks the Court to declare Wisconsin's garnishment law before judgment, more particularly Sections

267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 unconstitutional, for the aforesaid reasons;

WHEREFORE a hearing was held pursuant to the Order to Show Cause before the Honorable Thaddeus J. Pruss, January 3, 1967 at 9:00 A. M. in his Courtroom in the Courthouse at Milwaukee, Wisconsin;

WHEREFORE at said hearing the plaintiff appeared by counsel Sheldon D. Frank and defendant appeared by counsel Thomas M. Jacobson;

Upon all the records, pleadings, and files herein it is

NOW THEREFORE ORDERED:

That the garnishment action in the instant proceedings does not violate defendant's constitutional rights under the Wisconsin Constitution, Article 1, Section 9 and the United States Constitution 14th Amendment due process and equal protection;

That the said determination is for the legislature and not for the Court;

That Wisconsin's garnishment law before judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 is therefore not unconstitutional.

That defendant's attorney requests a stay in the garnishment action for purposes of appeal therefore the Court further Orders that all proceedings in the instant garnishment action be and hereby are temporarily stayed until further Order of this Court.

Dated at Milwaukee, Wisconsin, this 7th day of January, 1967.

/s/ THADDEUS J. PRUSS

THADDEUS J. PRUSS, *County Judge*

Notice of Appeal to Circuit Court

(Formal Parts Omitted)

PLEASE TAKE NOTICE that the defendant, Christine Sniadach, does hereby appeal to the Circuit Court of Milwaukee County, State of Wisconsin from the order made herein on the 6th day of January, 1967, by the Honorable Thaddeus J. Pruss, County Court Judge, which Order refused to dismiss the garnishment action herein on the basis the Wisconsin garnishment before judgment laws; to-wit, Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 did not deprive defendant of her constitutional rights under the Wisconsin Constitution, Article 1, Section 9, and the United States Constitution 14th Amendment due process and equal protection.

Dated at Milwaukee, Wisconsin this 9th day of January, 1967.

/s/ THOMAS M. JACOBSON
BARBEE & JACOBSON
MARTIN R. STEIN

Defendant's Attorneys

Order of Circuit Court

(Formal Parts Omitted)

The appeal in this action having been brought before the Honorable George D. Young, Judge of the Circuit Court in and for Milwaukee County, and pursuant to Stipulation of the parties, judgment rendered after filing of briefs by both parties,

NOW THEREFORE, upon motion of Sheldon D. Frank, attorney for the respondent, Family Finance Corporation of Bay View,

IT IS HEREBY ORDERED:

That the judgment of the Honorable Thaddeus J. Pruss, Judge of the County Court, in favor of said respondent, Family Finance Corporation of Bay View and against the appellant, Christine Sniadach, alias, as rendered and entered on the 3rd day of January, 1967, holding that said action, a garnishment issued before the suit was instituted was constitutional and did not violate the due process and equal protection right of the appellant-defendant, be and same hereby is affirmed.

Dated at Milwaukee, Wisconsin, this 18th day of April, 1967.

/s/ GEORGE D. YOUNG
Judge of the Circuit Court

Approved this 4th day of April, 1967
/s/ THOMAS M. JACOBSON
THOMAS M. JACOBSON, *Attorney for Def.*

36 MEMORANDUM DECISION
(Formal Parts Omitted)

PREFATORY

This is an appeal from Branch 6 of the County Court of Milwaukee County. The plaintiff above named commenced a garnishment action against the defendant and named the Miller Harris Instrument Co. garnishee. Thereafter, the defendant moved the Court below by way of an order to show cause requesting the dismissal of the action upon the ground that the proceeding violated the defendant's rights under Article I, Section 9, of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution.

The defendant appears now to have abandoned her contention that there has been a violation of Article I, Section 9, of the Wisconsin Constitution and now contends that the proceeding has violated her rights under Article VII, Section 2, of the Wis-
37 consin Constitution.

MEMORANDUM DECISION

ARTICLE VII, SECTION 2, OF THE WISCONSIN CONSTITUTION

Section 2 of Article VII provides in part that "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, ..."

The basis for this argument is that Chapter 267 contains a presumption made by the legislature

that in all disputes between a creditor and his alleged debtor the creditor will prevail and the debtor must automatically prepare for satisfaction of the creditor's claim through immediate seizure of his property. It is argued that the plaintiff need only file the summons and complaint with the clerk who is then automatically required to issue what purports to be "an order of the County Court," although it commands not merely an appearance but disposes of the property, and that no judge is involved in any way in this process up to this point. This argument concludes that all authority to act in a preliminary dispute involving particular litigants has been withdrawn from the Court and is in effect decided by the legislature.

The foregoing argument does violence to the provisions of Chapter 267, Wis. Stats. It is true that the legislature has afforded a remedy
38 not known to the common law for the protection of creditors. The remedy provided simply requires that the garnishee complaint must allege the existence of one of the grounds for garnishment, the amount of the plaintiff's claim, above all offsets, known to the plaintiff, and that the plaintiff believes the garnishee is indebted to or has property in his possession or under his control belonging to the defendant and that such indebtedness or property is not exempt from execution (Sec. 267.05 (1)).

Chapter 267 further provides that the garnishee summons and complaint shall be served on the principal defendant not later than 10 days after service on the garnishee as provided in Sec. 262.06 (Sec. 267.07). If the answer of the garnishee shows a debt due the defendant, the garnishee may

pay the same or sufficient thereof to cover the claim of the plaintiff, with interest and costs, to the clerk of the court. There is the further provision that the plaintiff may request the garnishee in writing to pay such sum to the clerk, and the garnishee must, within 5 days after receipt of such request, pay the sum to the clerk who then issues his receipt to the garnishee who is thereby released of all liability (Sec. 267.13). However, no trial is had in the garnishment action until the plaintiff has judgment in the principal action, which is dismissed in those cases in which judgment goes for the defendant (Sec. 267.16).

Wisconsin has held that garnishment before execution is a provisional remedy. Mahrle v. 39 Engle, 261 Wis. 485. The Court is unable to find Wisconsin authority that directly rebuts the defendant's attack on Chapter 267 of the statutes; but it has long been held that a state may by appropriate legislation authorize the attachment or garnishment of property within its borders, subject to the limitations of the federal and state constitutions. An attachment or garnishment is not a deprivation of property without due process of law within the meaning of constitutional provisions, inasmuch as there must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim. 6 Am. Jur. 2d. p. 563. Sec. 267.16 (1) does that very thing.

So far as the payment into court is concerned, no judicial process seems to be involved. The payment amounts to nothing more than a ministerial act to relieve the garnishee defendant of litigation and the funds come into the possession

of the court in custodia legis, and until adjudication in the main action has occurred nothing more than a temporary deprivation has occurred. That deprivation is of statutory creation in favor of the creditor which was in existence at the time the debt was created. In this connection the language of Byrd v. Rector, 112 W. Va. 192, 81 A. L. R. 1213, 1216, is particularly appropriate:

"We think the answer to these propositions is that a defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process. In the meantime there has been no deprivation of property. The attachment, quasi rem in nature, has operated only to detain the property temporarily, to await final judgment on the merits of plaintiff's claim. No constitutional right is impaired. McInnes v. McKay, 127 Me. 110, 141 A. 699 Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp."

The Court does not believe there is any need for a judicial act until the defendant's liability to the plaintiff is before the Court.

II

DEPRIVATION OF PROPERTY PRIOR TO NOTICE

Defendant argues that her property can be taken before she receives notice of the garnishment proceeding. This, of course, is based on the provisions set forth in Sec. 267.07 (1) which provide for service of a copy of the garnishee summons and complaint or a notice of such service be served not later than 10 days after service on the garnishee. It is argued that the garnishee defendant cannot only withhold defendant's wages but can file an answer asserting that he owes wages to the defendant and simultaneously pay a substantial portion of those wages to the clerk before any notice of the proceeding is given to the defendant. The argument concludes by stating that the defendant is given inadequate notice because such notice as he gets comes after the purpose of the garnishment is a fully accomplished fact. This is an erroneous view of the process.

The timeliness of the notice is truly the basis of the defendant's lament. The important fact, however, is that the defendant does have notice even though it may be given after his property is in custodia legis. Defendant's argument rejects the fact that nothing has happened to the defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff.

The argument would deprive the garnishee defendant of a means whereby involvement in litigation might be terminated in order that a defendant who contracted a debt with the provisional remedy in existence may have the use of his property.

Whether a debtor should be relieved of garnishment while an action for debt is pending is one involving legislative or public policy. When the legislative prupose has been declared in unmistakable language, it is not within the province of the Court to interpose contrary views of what the public need demands. Wait v. Pierce, 191 Wis. 202. And the courts have nothing to do with the policy of laws, their only duty is to interpret the laws as enacted by the legislature. Waldum v. Lake Superior T. & T. R. Co., 169 Wis. 137.

III

NO HEARING BEFORE DEPRIVATION OF PROPERTY

The thrust of the defendant's argument on
42 this point is that she is not afforded the right to challenge the withholding of her wages prior to judgment in the main action and that she loses her property solely upon the service of summons and verified complaint in the garnishment action. This argument amounts to a paraphrasing of the second argument. Since the provisional remedy is constitutionally allowable a legitimate basis for garnishment exists. The argument that defendant is afforded no challenge to the withholding of her wages is ad hominem. If the main action falls, so then does the garnishment and no property belonging to the defendant is lost.

The debt was contracted with the provisional remedy in existence and became part of the contract. To deprive the plaintiff of that remedy would be an impairment of contract and constitutionally bad.

Defendant further argues that the main action involves a promissory note and since plaintiff's attorney is not personally privy to all the facts he should not be allowed to verify the complaint and the plaintiff should be required to personally verify the complaint. Just how this invades the defendant's constitutional rights is not made clear. Certainly the defendant has adequate statutory remedies, both investigative and procedural, which furnish an adequate basis for the protection of her rights.

IV

VIOLATION OF DUE PROCESS BECAUSE LACK OF NOTICE IS NOT CONDITIONED ON NEED FOR SUMMARY PROCESS

Defendant argues that absent a claim that a defendant is about to leave the employ of the garnishee, or is about to flee the state entirely, the employee's wages are a continuing asset against which the plaintiff can proceed even after judgment; that such an exercise of jurisdiction is normally authorized only where jurisdiction may not be established in any other manner or the defendant is taking steps which may frustrate the plaintiff's judgment.

It is supposed that garnishment was a legislative incentive for the extension of credit. A means whereby a seller might protect himself

against persons not well known to him. Whatever the purpose, the legislature provided the remedy, and the defendant contracted her debt with the right of garnishment on the plaintiff's side. Defendant's argument begs the very reason for the statute. Whether the reason for the statute still exists or has ceased to exist is a matter for legislative determination.

V

UNCONSTITUTIONAL INTERFERENCE WITH APPELLANT'S RIGHT TO GAINFUL EMPLOYMENT - VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Defendant cites Slaughter-House Cases, 16 Wall. 36 (1873), as authority for the proposition that the right to pursue a gainful employment unimpeded by arbitrary state interference is a liberty preserved under the due process clause of the Fourteenth Amendment to the United States Constitution. Defendant goes on to argue that Chapter 267, Wis. Stats., deprives defendant of income earned without any demonstration that
44 there is a need for such deprivation. Further, that persons of low income cannot post the bond in the amount of one and one-half times the sum in dispute and that, therefore, this remedy is illusory; that the deprivation of income is the most direct interference with the employment relationship, and that garnishment may cause an employee to be discharged by an employer.

Again, whether a creditor should be deprived of the provisional remedy in the case of a poor

person is a matter for legislative determination. As matters now stand, the remedy does not exist until credit has been extended. If the remedy is drastic, it behooves the defendant to refrain from contracting debts beyond her ability to pay. Certainly this Court is without authority in law to override the legislative policy declared in Chapter 267, Wis. Stats. There is nothing arbitrary about establishing a provisional remedy in connection with the process of collecting a debt. Whether a need for that remedy exists is for the legislature to determine.

VI

DENIAL OF EQUAL PROTECTION OF LAW

Defendant argues that Chapter 267 deprives the defendant of equal protection of law in violation of the Fourteenth Amendment to the United States Constitution because it permits illegal discrimination between persons in similar circumstances. This argument is based upon the proposition that Sec. 267.22, Wis. Stats., permits garnishment
45 of salaries and wages of public officers and employees after judgment only.

Chapter 267 does treat public employees different than members of the public at large as stated by the defendant. It has been held that this is a proper classification. 4 O.A.G. 783. The Court agrees with that opinion. The continuity of the public business may very well be the reason why garnishment may not lie against a public employee until after judgment. That reason may lend support to the defendant's previous

argument concerning interference with her employment but it does not destroy the reason for the classification. The validity of differentiating between public and private employees effectively destroys defendant's argument in this respect.

CONCLUSION

The judgment of the County Court of Milwaukee County must be affirmed, and plaintiff's counsel will accordingly prepare an appropriate order for judgment, submit the same to counsel for the defendant for approval as to form, and thereafter offer the same for signing and entry.

Dated at Milwaukee, Wisconsin, this 15th day of March, 1967.

BY THE COURT:

/s/ George D. Young
Circuit Judge

Notice of Appeal to Supreme Court

(Formal Parts Omitted)

PLEASE TAKE NOTICE that the defendant-appellant, Christine Sniadach, does hereby appeal to the Supreme Court of the State of Wisconsin from the Order entered herein on the 18th day of April, 1967 by the Honorable George D. Young, Circuit Court Judge In and For Milwaukee County Branch Number One thereof, which Order affirmed the judgment of the Honorable Thaddeus J. Pruss, County Judge In and For Milwaukee County, Branch Number Six thereof, said judgment holding Wisconsin's garnishment before judgment statutes constitutional and not in violation of defendant-appellant's equal protection and due process guarantees.

Dated this 18th day of April, 1967.

/s/ THOMAS M. JACOBSON
THOMAS M. JACOBSON
Defendant-Appellant's Attorney

To: SHELDON D. FRANK, ESQ., *Plaintiff's Attorney,*
135 West Wells Street,
Milwaukee, Wisconsin
CLERK OF CIRCUIT COURT, Milwaukee
County, Milwaukee, Wisconsin

INDEX TO APPENDIX

	Record Page	App. Page
DECISION OF CIRCUIT COURT	36-45	101
GARNISHMENT SUMMONS	2	110
GARNISHMENT COMPLAINT	7	113
GARNISHEE ANSWER	8	115
ORDER TO SHOW CAUSE	9-10	116
ORDER COUNTY COURT	17-18	118
NOTICE OF APPEAL TO CIRCUIT COURT	42	120
ORDER CIRCUIT COURT	47	121
NOTICE OF APPEAL TO SUPREME COURT	49	122

Opinion of Supreme Court of Wisconsin

And afterwards, to-wit on the 8th day of December, A.D. 1967, the same being the 61st day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

—v.—

CHRISTINE SNIADACH, ALIAS,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

Opinion by Chief Justice Currie

This cause came on to be heard on appeal from the judgment of the Circuit Court for Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court for Milwaukee County herein be, and the same is hereby affirmed. (Justices Heffernan and Wilkie dissent. Opinion filed.)

Opinion of Supreme Court of Wisconsin

No. 64

August Term, 1967

STATE OF WISCONSIN—IN SUPREME COURT

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

—v.—

CHRISTINE SNIADACH, ALIAS,

Appellant,

—

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

APPEAL from an order of the circuit court for Milwaukee county: GEORGE D. YOUNG, Circuit Judge. *Affirmed.*

Plaintiff finance corporation instituted a garnishment action in the county court of Milwaukee county naming Christine Sniadach as defendant and Miller Harris Instrument Co. as garnishee. Both defendant and garnishee were served with copies of the verified garnishee complaint and the garnishee summons on November 21, 1966.

The garnishee complaint alleged that: a summons had been issued in an action by plaintiff finance corporation against defendant; judgment had not yet been entered; the action was one to recover damages upon a promissory note; and the amount of plaintiff's claim against defendant was $420 above all offsets. On November 30, 1966, the garnishee filed its answer in which it stated it had wages of $63.18 in its control belonging to defendant, and that it would

pay one half thereof to defendant as a subsistence allowance and hold the other half subject to the further order of the court.

On December 23, 1966, defendant served on plaintiff's counsel and filed an order requiring plaintiff to show cause why the garnishment proceedings should not be dismissed for violating defendant's rights under Art. I, Sec. 9 of the Wisconsin Constitution, and under the due process and equal protection clauses of the United States Constitution. A hearing was held on January 3, 1967, and on January 7, 1967, the county court, Thaddeus J. Pruss, Judge, presiding, entered its order upholding the constitutionality of Wisconsin's garnishment before judgment statutes, secs. 267.02 (1) (a) 1, 267.05 (1), and 267.07 (1), Stats.

Defendant then appealed from this order to the circuit court. On April 18, 1967, the circuit court affirmed the county court's order, and defendant has appealed from the circuit court's order.

CURRIE, C. J. Appellant attacks the constitutionality of Wisconsin's garnishment before judgment statutes, secs. 267.02 (1) (a) 1, 267.05 (1), 267.07 (1), 267.16 (1), 267.18 (2), and 267.21, Stats., on a number of grounds based on injustices and deprivations which have been, or are likely to be, suffered by others, but which she has not personally experienced.

One such ground is that poor wage earners may have their wages garnished in a situation where there is no merit to the claim for which the principal action has been instituted. As a result such wage earners either are forced to settle with the plaintiff by assigning future wages, or are deprived of their wages for a long period of time until the principal action can be tried and probable cause de-

termined. Here, appellant's indebtedness is on a note, and her affidavit in support of the order to show cause contains no allegation that she is not indebted thereon to plaintiff.

Another alleged ground of unconstitutionality is that sec. 267.18 (2) (a), Stats.,[1] makes no accommodation for defendants with more than one dependent. However, appellant received the benefit of the maximum subsistence allowance of one half of the amount of her garnished wages, and her affidavit does not allege how many dependents, if any, she has.

Another alleged ground of unconstitutionality is that sec. 267.21, Stats., which permits a defendant to post a bond and secure the release of his garnished property, denies equal protection of the laws to persons of low income. Appellant has made no showing that she is a person of low income and unable to post a bond.

A further alleged ground of unconstitutionality is that the garnishment before judgment statutes threaten the gainful employment of many wage earners. It is claimed that many employers discharge garnished employees for being unreliable. Appellant, however, has made no showing that her own employer reacted in this manner.

---

[1] Sec. 267.18 (2) (a), Stats., provides: "When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50% of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action."

Still a further ground of attack is the provision in sec. 267.07 (1), Stats., which affords ten days' time to plaintiff to serve the garnishee summons and complaint on defendant after service of same on the garnishee. Here, appellant was served on the same day as the garnishee.

It is a long-accepted rule that a party may not urge the unconstitutionality of a statute upon a point not affecting his or her rights.[2] In *State ex rel. Kellogg* v. *Currens*[3] the challenging party presented 11 grounds of attack upon the constitutionality of a statute. The court discussed the one which affected the challenger but refused to discuss the other ten, stating:

> "... Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions ... We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others. ..."[4]

Accordingly we will confine our consideration of appellant's grounds of attack upon the garnishment before judgment statutes to those directly affecting her. The grounds of attack which will thus be considered are:

---

[2] *Scharping* v. *Johnson* (1966), 32 Wis.2d 383, 395, 145 N.W.2d 691; *Joint School Dist.* v. *Boyd* (1955), 270 Wis. 222, 226, 70 N.W.2d 630; *Milwaukee Boston Store Co.* v. *Amer. Fed. of H. W.* (1955), 269 Wis. 338, 357, 69 N.W.2d 762; *Anderson* v. *State* (1936), 221 Wis. 78, 89, 265 N.W. 210; *State ex rel. Kellogg* v. *Currens* (1901), 111 Wis. 431, 87 N.W. 561; 16 C.J.S., *Constitutional Law*, p. 226, sec. 76(a).

[3] *Supra*, footnote 2.

[4] *Id.* at pp. 442-443.

(1) These statutes deprive appellant of her property without due process of law.

(2) Appellant is denied due process of law, because the statutes afford her no right to an immediate hearing to challenge the validity of the garnishment.

(3) The legislature has assumed judicial powers in violation of art. VII, sec. 2, Wis. Const.

(4) The garnishment before judgment statutes deny appellant equal protection of the laws because they subject wage earners to harsher summary process than other classes of debtors.

Deprivation of Property Without Due Process.

The garnishment before judgment proceedings do not involve any final determination of the title to a defendant's property, but merely preserve the status quo thereof pending determination of the principal action. The defendant receives notice and a hearing before being permanently deprived of his or her property.

In *McInnes* v. *McKay*[5] it was contended that Maine's statute, which permitted attachment, without affidavit or bond, in advance of judgment, deprived the defendant of due process of law contrary to the fourteenth amendment of the United States Constitution. The relevant statute provided:

> "All civil actions, except scire facias and other special writs shall be commenced by original writs; which, in the Supreme Judicial Court, may be issued by the

[5] (1928), 127 Me. 110, 141 Atl. 699.

clerk in term time or vacation, and framed to attach the goods and estate of the defendant, and for want thereof to take the body, or as an original summons without an order to attach goods and estate." [6]

The court held that this was

"... not a deprivation without 'due process of law' for it is part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal." [7]

It noted that the attachment merely created a temporary lien, which did not destroy the defendant's title. The court also cited the United States Supreme Court's statement in *Rothschild* v. *Knight*[8] that to what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide.

McInnes v. *McKay* was affirmed by the United States Supreme Court in a per curiam decision[9] on the authority of *Ownbey* v. *Morgan*[10] and *Coffin Brothers* v. *Bennett*.[11]

Ownbey v. *Morgan* upheld the constitutionality of Delaware's foreign attachment law as not being a denial of due process even though it harshly provided that before the defendant could appear and defend he had to give security in the amount of the value of the property attached. The court in its opinion declared:

"The due process clause does not impose upon the States a duty to establish ideal systems for the ad-

---

[6] Maine Rev. Stats. 1928, ch. 86, sec. 2.

[7] *Supra*, footnote 5, at p. 116.

[8] (1902), 184 U.S. 334, 341, 22 Sup. Ct. 391, 46 L.Ed. 573.

[9] (1928), 279 U.S. 820, 49 Sup. Ct. 344, 73 L.Ed. 975.

[10] (1921), 256 U.S. 94, 41 Sup. Ct. 433, 65 L.Ed. 837.

[11] (1928), 277 U.S. 29, 48 Sup. Ct. 422, 72 L.Ed. 768.

ministration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. . . ." [12]

Coffin Brothers v. *Bennett* involved a Georgia statute which authorized the superintendent of banks to issue an execution against the property of a stockholder of a defunct bank upon whom a stock assessment had been levied. Mr. Justice Holmes wrote the unanimous opinion for the court and stated:

"The objection urged by the plaintiffs in error seems to be that this section purports to authorize an execution and the creation of a lien at the beginning, before and without any judicial proceeding. But the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors.' A reasonable opportunity to be heard and to present the defence is given and if a defence is presented the execution is the result of a trial in Court. The Fourteenth Amendment is not concerned with the form. *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 42. The fact that the execution is issued in the first instance by an agent of the State but not from a Court,

[12] *Supra,* footnote 10, at pp. 110-111.

followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection. . . ." [13]

While neither *Ownbey* v. *Morgan* nor *Coffin Brothers* v. *Bennett* involved garnishment before judgment statutes, their rationale, when cited by the United States Supreme Court as authority for affirming *McInnes* v. *McKay* becomes clear. It is that the creditor's remedies involved, though harsh, did not deprive a man of his property without notice and an opportunity to be heard.

The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times.[14] In regard to the constitutional relevance of antiquity, Mr. Justice Holmes has stated:

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey* v. *Morgan*, 256 U. S. 94, 104, 112." [15]

---

[13] *Supra*, footnote 11, at p. 31.

[14] 1 Wade on Attachment (1886), pp. 19-22, sec. 1.

[15] *Jackman* v. *Rosenbaum Co.* (1922), 260 U.S. 22, 31, 43 Sup. Ct. 9, 67 L.Ed. 107. See also *Frank* v. *Maryland* (1959), 359 U.S. 360, 370, 79 Sup. Ct. 804, 3 L.Ed.2d 877, in which Mr. Justice Frankfurter cites *Jackman* and *Ownbey* as to the legal significance of a long and consistent history of state practice.

We deem a West Virginia decision, which dealt with a before judgment garnishment, to be apposite. In *Byrd* v. *Rector*[16] the nonresident defendant, who had been garnished before judgment, argued that he had been denied due process because the plaintiff had not been required to post a bond before the garnishment. The court stated:

> "We think the answer to these propositions is that a defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment *in personam* or *in rem* on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process. In the meantime there has been no deprivation of property. The attachment, *quasi rem* in nature, has operated only to detain the property temporarily, to await final judgment on the merit's [sic] of plaintiff's claim. No constitutional right is impaired. *McInnes* v. *McKay*, (Me.) 141 Atl. 699. Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp. Under no circumstances could it be converted into cash and applied on the plaintiff's demand prior to final adjudication

[16] (1932), 112 W. Va. 192, 163 S.E. 845.

> of the merits of the controversy between plaintiff and defendant. Now, if pending such determination, the defendant is inconvenienced because he is temporarily deprived of the possession and use of his property in the hands of the garnishee, the defendant may acquire possession by giving bond, for which provision is made by Official Code, 38-7-20. We find no error under this point." [17]

In view of the aforecited authorities, we determine that Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law.

Failure of Garnishment Statutes to Afford Appellant an Immediate Hearing

Sec. 267.16 (1), Stats., provides:

> "No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs."

Appellant contends that the failure of the garnishment statutes to afford her an immediate hearing on the propriety of the garnishment constitutes a denial of due process.

However, despite the fact that the garnishment statutes do not grant to appellant the right of judicial review of the propriety of the garnishment action prior to trial of the principal action, Wisconsin case law establishes that she can obtain such judicial review.

---

[17] *Id.* at p. 198. *See also* 16 Am. Jur. 2d, *Constitutional Law*, p. 980, sec. 576.

In *Orton* v. *Noonan*[18] the court stated in regard to garnishment before judgment:

> ". . . the court, without the aid of any express statutory provision, has a general power to control and regulate the proceeding upon summary process of this nature, so as to correct or prevent any abuse or misuse of such process, and that the defendant may, in some proper form, contest the truth of the grounds alleged by the plaintiff for obtaining it." [19]

Thus the court's power to control its process is inherent and requires no statutory authorization.

This court in *Chermin* v. *International Oil Co.*[20] reaffirmed the right of a defendant to move to quash or dismiss the garnishment action to the point of a judicial ascertainment that a good-faith controversy exists. The procedure approved therein was a motion for summary judgment dismissing the garnishment action on the ground that the complaint in the principal action failed to state a cause of action "for damages founded upon contract" as required by then sec. 267.01 (3), Stats. Such requirement is now to be found in present sec. 267.02 (a).

Thus potential abuses of garnishment before judgment are subject to judicial review before trial of the principal action. Moreover, a garnishment without probable cause can be the basis of a suit for malicious prosecution.[21] We, therefore, find no denial of due process in the failure of the garnishment statutes to contain a provision for judicial review of the propriety of a garnishment action prior

---

[18] (1871), 27 Wis. 572.

[19] *Id.* at p. 579.

[20] (1932), 261 Wis. 308, 52 N.W.2d 785.

[21] *Novick* v. *Becker* (1958), 4 Wis. 2d 432, 90 N.W.2d 620.

to trial of the principal action, inasmuch as such right exists independently of statute.

Assumption of Judicial Powers

Sec. 267.04, Stats., provides in part as follows:

"(1) Upon payment to the clerk of court of a clerk's fee of $2 and a suit tax of $1, the clerk shall issue a garnishee summons . . .

"(2) The garnishee summons shall be substantially in the following form:

". . .

"YOU ARE ORDERED TO RETAIN SUCH PROPERTY [belonging to the defendant] AND MAKE NO PAYMENT, EXCEPT FOR SUBSISTENCE ALLOWANCE IF ANY, TO THE PRINCIPAL DEFENDANT PENDING THE FURTHER ORDER OF THE COURT.

". . .

"(3) A garnishment action shall be commenced by the service of a garnishee summons and annexed verified complaint."

In regard to the complaint, sec. 267.05 (1), Stats., provides:

"The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in s. 267.02 (1) (a), the amount of the plaintiff's claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property

> is, to the best of plaintiff's knowledge and belief, not exempt from execution."

The plaintiff must file with or mail to the clerk of court a copy of both the garnishee summons and complaint before serving the garnishee-defendant.[22] We deem a more accurate statement of appellant's position to be that the legislature has attempted to unconstitutionally vest judicial powers in an administrative officer.

This court in 1927 in *State* v. *Van Brocklin*[23] upheld the constitutionality of a state statute which conferred power on a clerk of court to issue a search warrant upon determining probable cause against the contention that this violated art. VII, sec. 2, Wis. Const. The court quoted with approval from the Alabama case of *Kreulhaus* v. *Birmingham*[24] as follows:

> "'. . . it was not the intention of the framers of the Constitution to deny to the Legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary, properly so called, many duties involving inquiries in their nature judicial.'"[25]

While some members of this court question some of the reasoning employed by the court to reach the result in *State* v. *Van Brocklin*, we approve of the holding that some duties involving inquiries judicial in their nature may be delegated to administrative officers where the acts of such officers are later subject to judicial review.

---

[22] Sec. 267.10, Stats.

[23] (1927), 194 Wis. 441, 217 N.W. 277.

[24] (1909), 164 Ala. 623, 51 So. 297.

[25] *Id.* at p. 629.

In *Central Loan & Trust Co.* v. *Campbell*[26] the United States Supreme Court considered the argument that a territorial statute of Oklahoma was void, because it allowed a probate judge to issue a writ of attachment, while the organic act of the territory vested all common law jurisdiction in the Supreme Court and District Courts of Oklahoma. The court rejected this argument, and stated:

> "On the face of the Oklahoma statute it is apparent that it is required as a prerequisite to the issuance of an attachment that the affidavit, in support thereof, shall simply state the particular ground for attachment mentioned in the act, and therefore that the granting of an order for attachment does not involve the discharge of a judicial function, but merely the performance of a ministerial duty, that is, the comparison of the language of the affidavit with the terms of the statute . . . It is elementary that where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court." [27]

As appears from the prior quotation herein from *Coffin Brothers* v. *Bennett*,[28] the United States Supreme Court also found unobjectionable the fact that the execution had been issued by the state superintendent of banks instead of a court. However, the court was there concerned with the due process clause of the fourteenth amendment rather

---

[26] (1899), 173 U.S. 84, 19 Sup. Ct. 346, 43 L.Ed. 623.

[27] *Id.* at pp. 95-96.

[28] *Supra*, footnote 11.

than the issue of unconstitutional delegation of judicial power contrary to a state constitution.

We find no merit to appellant's contention that sec. 267.04, Stats., violates art. VII, sec. 2, Wis. Const.

Denial of Equal Protection of the Laws

Appellant's brief asserts that the garnishment before judgment statutes subject wage earners to harsher summary process than other classes of debtors. However, any debtor, wage earner or not, is subject to these statutes. For example, bank accounts of businessmen and corporations are subject to garnishment before judgment. It may be argued generally that the effect of garnishment before judgment is harsher on wage earners than other classes of debtors. However, appellant has not set forth how these statutes, as applied to her own particular situation, have denied her equal protection of the laws. We decline to consider this argument of denial of equal protection in the absence of facts substantiating such contention.

Pending Legislation

This court is fully cognizant of the fact that many undue hardships have resulted from the operation of Wisconsin's before judgment garnishment statutes in the cases where wages and salaries of employees have been garnished. We are pleased that there is pending before the present legislature legislation that will remedy these abuses.

On November 14, 1967, the assembly passed by a vote of 89 to 5 Substitute Amendment 1, to Bill No. 454, which bars garnishment before judgment of the wages or salary of the principal defendant. The State Senate now has this measure before it.

By the Court.—Order affirmed.

Dissenting Opinion of Supreme Court of Wisconsin

(Filed December 8, 1967)

STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1967

No. 64

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

—v.—

CHRISTINE SNIADACH, alias,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

HEFFERNAN, J. (dissenting) The majority opinion would lead one to believe that garnishment before judgment is a venerable practice of Anglo-Saxon jurisprudence and should be accorded the imprimatur of time. Yet, the fact of the matter is that this is a rather new development in Wisconsin law. The excellent brochure written by Paul L. Moskowitz for the Wisconsin Extension Law Department states:

> "Chapter 267 of the Wisconsin Statutes (1959) comes from R.S. 1878, Section 2752. The statute in Wisconsin originally provided garnishment as a rem-

edy in aid of execution only. Many states still follow this law." 1962 Wisconsin Lawyers' Seminars, Wisconsin Garnishment and Exemptions, p. 1.

Garnishment is strictly a statutory remedy. *Markman* v. *Becker* (1959), 6 Wis. 2d 438, 95 N.W. 2d 233. Thus, it is apparent that it is no great sacred bastion of the common law that is under assault in this case. The only question is whether legislative action has deprived the defendant and others similarly situated of their constitutional rights.

The majority concludes that the garnishment statute does not result in a deprivation of property. The rationale behind this is embodied in the majority's quotation from *Byrd* v. *Rector* (1932), 112 W. Va. 192, 163 S.E. 845. The essence of that quotation is that there is no deprivation of the defendant's property because the procedure places the defendant's property in the hands of the law and not in the hands of the plaintiff until after judgment.

It strikes me that this reasoning is most unrealistic. The constitutional question is not whether defendant has lost his title to the property, nor whether another has gained its beneficial use. The test is whether *he* was deprived of his property. In the instant case no legal fiction can disguise the fact that, from the time of the service of the garnishee summons until the lien of that process is released, the defendant is unable to make any beneficial use of his wages other than the pittance which may be available to him either as an exemption or subsistence allowance. Moreover, the case of *Byrd* v. *Rector* is only of strained applicability in the present case. In that case an infant plaintiff, who had been injured by the explosion of a dynamite cap which had been negligently disposed of by a nonresident defendant, commenced a suit in tort

for his personal injury. Accordingly, an *attachment* was issued on the ground that the defendant was a nonresident. The *Byrd Case* furnishes a sound rationale in support of our attachment laws, and were the plaintiff's attack on the attachment procedures, ch. 266 of the Wisconsin statutes, the citation would be more appropriate. Chapter 266 recognizes that attachment is an unusual remedy—to be resorted to only in special circumstances. It is designed to protect state residents from creditors whose conduct amounts to fraud or from foreign creditors who have assets within the state. The *Byrd Case* situation is clearly contemplated by sec. 266.03(2)(a):

> "(2) Tort Action. In tort actions the affidavit shall state that a cause of action in tort exists in favor of the plaintiff and against the defendant, that the damages sustained exceed fifty dollars specifying the amount claimed and either:
>
> "(a) That the defendant is not a resident of this state. . . ."

The case of *Ownbey* v. *Morgan* (1921), 256 U.S. 94, 109, 41 Sup. Ct. 433, 65 L. Ed. 837, points out that the attachment of the goods of a foreigner is to be treated uniquely and is dependent in part on the duty of a state to protect its own citizens in their claims against nonresident owners of property situate within the state. The *Ownbey Case* uses a rather quaint, archaic, and unacceptable rationale in concluding that there is no denial of due process when a debtor's property is detained, stating:

> "[A] man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition; and it cannot be

deemed so arbitrary as to render the procedure inconsistent with due process of law. . . ." P. 111.

This same case stressed the origins of the attachment procedure and pointed out that its purpose was to distrain the defendant's property to assure the appearance of the defendant so that there could be a procedure in personam against him. It is clear that *Ownbey* v. *Morgan* has little relevance to the Wisconsin law which permits the garnishment of wages of Wisconsin residents.

While *McKay* v. *McInnes* (1928), 279 U.S. 820, 49 Sup. Ct. 344, 73 L. Ed. 975, is relied upon by the majority, it appears that the United States Supreme Court without opinion merely affirmed the Maine court on the basis of *Ownbey* v. *Morgan, supra,* and *Coffin Brothers* v. *Bennett* (1928), 277 U.S. 29, 48 Sup. Ct. 422, 72 L. Ed. 768. As pointed out above, *Ownbey* is not applicable to this case. The *Coffin Brothers* opinion is a rather cursory one by Mr. Justice Holmes in which he justifies his conclusion on the basis that it is a "familiar method in Georgia." This is hardly a persuasive rationale; and as pointed out above, it is specious reasoning to conclude that, because a debtor has a chance to be heard on the question of whether or not his property should be returned to him, he has not been deprived of his property in the interim. Moreover, Mr. Justice Holmes points out that the defendants "are allowed to raise and try *every possible* defense by an affidavit of illegality." (Emphasis supplied.) The Wisconsin statute provides for no such comprehensive mode of defense available at the inception of the suit.

While some of the reasoning in these cases is appropriate to the garnishment of property, it has little or no relevance to the garnishment of wages. The garnishment

of wages is uniquely a product of the accrual bookkeeping system which has only come to fruition in the twentieth century. Until recently, laborers were paid by the day and not by the week or month. Hence, the law of garnishment in terms of historical precedent arose out of the garnishment of property other than wages. There is little pertinence in the majority's statement that the right to place a lien upon a man's property dates back to medieval England and Roman times. Accrued wages, in terms of the history of the law, are a new property right and should be treated by the law with that distinction in mind.

It should also be noted that until recently wages were totally exempt from garnishment. Rood on Garnishment (West's, 1896), sec. 87, page 119, states the policy of the wage exemptions that was nearly universal until near the end of the nineteenth century:

> "The policy of the law—the intent of the legislature in enacting these provisions—is too plain for argument. It was to secure to those who toil with their hands, or depend for their subsistence upon their personal earnings, a sufficient amount of the fruits of their labor to supply them and their families with the necessities of life and a few of the conveniences of modern civilization, free from the merciless grasp of their less needy creditors."

It was not until the enactment of ch. 141 of the Laws of Wisconsin (1883) that the exemption for wages was in part abandoned.[1]

---

[1] An earlier enactment, ch. 317, Laws of Wisconsin (1882), provided for an exemption of all wages for three months prior to the garnishment.

I would concede that it is not unconstitutional to deprive a defendant of his property, including wages, by garnishment and to hold it in *custodia legis* for a limited period of time so that the creditor can be certain that the assets are there to satisfy its judgment when once obtained. Under the Wisconsin statutes, however, the plaintiff need not serve his summons on the defendant until ten days after he has served the garnishee. This is a clear denial of due process, for the wages of the defendant are distrained without the necessity of notice to their equitable owner. As the majority opinion clearly points out, however, there is no allegation that this particular denial of justice took place in the instant case. It should be noted, however, that the very case relied upon by the court, *Ownbey* v. *Morgan, supra,* page 103, states that, in determining whether there is a denial of due process, the court is not confined to the particular case at hand but is to make its determination ". . . with respect to the general effect and operation of the system of procedure established by the statutes." While *Ownbey* takes the position that the unusual case of hardship should be overlooked in favor of the general statutory scheme, it is obvious that the converse reasoning is equally applicable.

The defendant complains, however, that even though the notice is given simultaneously, *i.e.,* by a concurrent service on both the principal defendant and the garnishee, nevertheless, the property is withheld unconscionably until there has been a trial of the principal action. The majority dismisses this contention by stating that it is in the inherent power of a court to prevent any abuse or misuse of the process and that the defendant may, as said in *Orton* v. *Noonan, infra,* "in some proper form" contest the truth of the grounds alleged by the plaintiff.

This court has defined that right to contest the plaintiff's use of process in *Chernin* v. *International Oil Co.* (1952), 261 Wis. 308, 52 N.W. 2d 785, and it is apparent that the defendant's rights are in fact limited to the determination of whether a good faith controversy exists. *Orton* v. *Noonan* (1871), 27 Wis. 672, quoted by the majority, makes it clear that all the plaintiff has to do to satisfy this requirement is the making and filing of an affidavit of indebtedness to the plaintiff. And *Chernin* v. *International Oil Co.* merely determined that where the complaint in the principal action alleges a cause of action for damages for breach of contract the garnishment action will not be dismissed.

Under the state of law as it now stands, unless the plaintiff's complaint is demurrable or on its face fraudulent there is no relief available to the defendant short of the trial of the principal action. There is no statutory or common law procedure whereby the defendant can in a timely or summary fashion "raise . . . every possible defense by an affidavit of illegality," as described in *Coffin Brothers* v. *Bennett, supra.* The right to a prompt and summary defense on the merits that Mr. Justice Holmes found as a saving grace in *Coffin* is fatally absent in the instant case.

Nor do I consider the possibility of a malicious prosecution action to be much solace to a wage owner who has been oppressed by an improper garnishment procedure action. If he has the resources to commence a retaliatory action for damages, he most likely would have been able to successfully defend himself in a garnishment action. The majority reasoning is similar to that of *Ownbey* where the United States Supreme Court concluded that the defendant's property would not have been seized if he were

not a man of property and, hence, he should be able to take care of himself. The circuity of the court's reasoning is not acceptable to me.

I conclude that a major constitutional defect of the statute is its failure to provide for a mandatory trial on the merits within a limited and statutorily defined time following the seizure of the defendant's wages.

I am in agreement with the majority's point that the issuance of a garnishee summons by the clerk of court does not constitute the usurpation of judicial power. I am, however, in complete disagreement with the rationale by which it arrives at that conclusion. Its conclusion is supported by the reliance on two discredited cases. The first of these is *State* v. *Van Brocklin* (1927), 194 Wis. 441, 217 N.W. 277. In this case the question was whether a statute which permitted the clerk of the Winnebago county court to issue a search warrant constituted the proper exercise of judicial power. The court in *Van Brocklin* found an implied authorization for such delegation of power in sec. 23, art. VII, of the Constitution, which manifestly was designed to provide for the appointment of court commissioners exercising the power of a judge in chambers. The court concluded that if the legislature had that power it undoubtedly had the residual power to authorize clerks of municipal courts to issue criminal warrants. It is submitted that this hardly follows. At any rate this court has subsequently, in *White* v. *Simpson* (1965), 28 Wis. 2d 590, 137 N.W. 2d 391, clearly ruled that only a magistrate exercising judicial power is authorized to issue a warrant, making it clear that the question of probable cause is not to be left to an administrative officer. *Giordenello* v. *United States* (1958), 357 U.S. 480, 486, 78 Sup. Ct. 1245, 2 L. Ed. 2d 1503, used the language, "The Commissioner must *judge*

for himself the . . . facts . . . to show probable cause." (Emphasis supplied.) The other case relied upon by the majority, *Kreulhaus* v. *Birmingham* (1909), 164 Ala. 623, 51 So. 297, held that the statute that permitted a clerk to issue warrants of arrest did not confer any judicial power. The rationale of the Alabama court was:

> "The statute in this case conferred no power upon the clerk to finally hear and determine, nor even to commit to bail, but only to issue warrants, which must be construed to authorize him to issue warrants on probable cause. . . ." Pp. 629-630.

It is obvious that following the *White* v. *Simpson* rationale, this case is equally repugnant to our now accepted standards of due process.

I agree with the court's rationale that the only determination required of the clerk is a ministerial one, that is, it is only necessary for the plaintiff to set forth in the language of the statute the basis upon which the summons is requested. This is not a determination of probable cause. It is not a judicial function and is not constitutionally prohibited. I object, however, to the majority's failure to rest their position upon this perfectly good argument. Instead they have chosen to shore up this rationale with outworn precedents of extremely dubious authority, and by so doing have put the ruling of *White* v. *Simpson* in jeopardy.

In view of my views set forth above, I must respectfully dissent from the court's opinion. I am convinced that the plaintiff has established that she is personally aggrieved to the extent that she may properly raise at least some of the constitutional issues which she presses. Since I find her complaint has validity as set forth above, I would

hold the garnishment statute unconstitutional in that it deprives the defendant of property—wages—without due process of law—in that she lacks any method of insuring a reasonably prompt adjudication of her rights and the return of her property. I also dissent because the majority opinion has failed to state adequately what I conceive to be its true position—that the affirmance of the trial court results not from a conviction that the trial court is correct on the constitutional question, but rather on the fact that this particular plaintiff has not been aggrieved. The court was no doubt influenced by the legislative progress of the bill that would end the garnishment of wages prior to judgment. There is an understandable willingness to "let sleeping dogs lie" when there exists the strong possibility that the legislature will shortly correct this harsh and unconstitutional legislation. I believe, however, that this court would be remiss in its constitutional duties if it did not hold a statute unconstitutional if in fact it appears to be so, even though the legislature is about to fashion a correction. Since I believe the statute to be in part unconstitutional, I would reverse.

I am authorized to state that Mr. Justice Wilkie joins me in this dissent.

Motion for Rehearing Denied

And afterwards, to-wit on the 27th day of February, A. D. 1968, the same being the 97th day of the August, 1967 Term, the following proceedings were had in said cause in this Court:

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

—v.—

CHRISTINE SNIADACH, alias,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in said cause, it is now here ordered that said motion be, and the same is hereby, denied with costs.

Certification of Record

I, Franklin W. Clarke, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the attached printed appellant's appendix in No. 64, August Term, 1967, in the Wisconsin Supreme Court, is a true copy of the original on file in this Court, and that the transcript of proceedings in said cause in this Court is correct and complete, and that this return constitutes a complete copy of the record before the Supreme Court of Wisconsin in said cause.

[SEAL]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Madison, Wisconsin, this 25th day of April, 1968.

/s/ FRANKLIN W. CLARKE

Clerk of Supreme Court
State of Wisconsin

Order Granting Certiorari

IN THE SUPREME COURT OF THE UNITED STATES

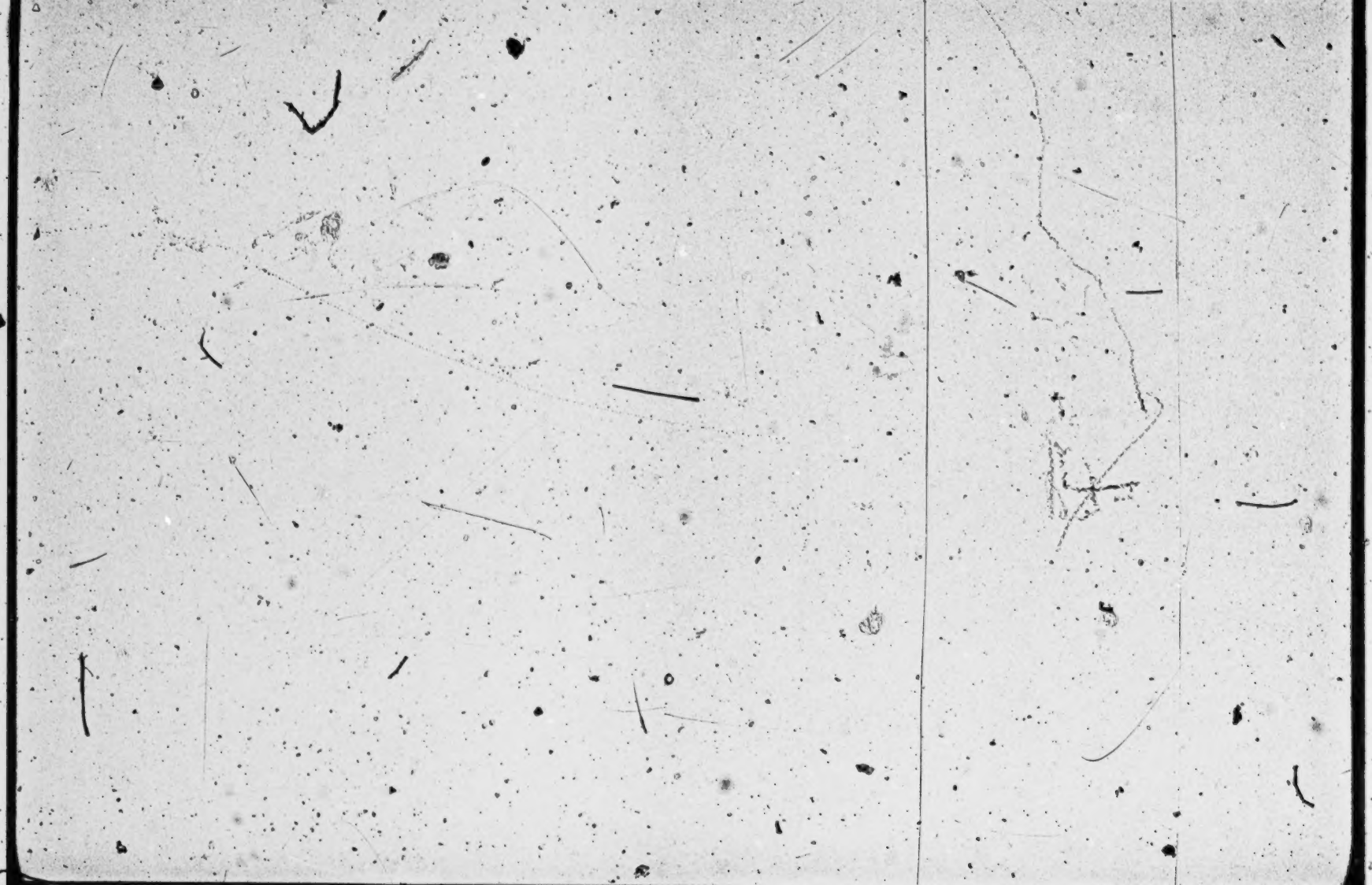
October Term, 1967

CHRISTINE SNIADACH, Petitioner,

—v.—

FAMILY FINANCE CORPORATION of Bay View and MILLER HARRIS INSTRUMENT COMPANY.

The petition for writ of certiorari is granted and the case is placed on the summary calendar.





LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 27 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 130

CHRISTINE SNIADACH,

Petitioner,

—v.—

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

JACK GREENBERG
JAMES M. NABRIT, III
LEROY D. CLARK
GABRIELLE A. KIRK
PHILIP G. SCHRAG
10 Columbus Circle
New York, New York 10019

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Attorneys for Petitioner

WILLIAM F. YOUNG, JR.
Of Counsel

INDEX

	PAGE
Citation to Decisions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	3
How the Federal Question Was Raised and Decided Below	4
REASONS FOR GRANTING THE WRIT:	
I. Certiorari Should be Granted to Review an Issue of National Importance: The Widespread Use of Pre-Judgment Wage Garnishments to Compel Wage Earners to Make Favorable Settlements With Their Alleged Creditors Without Hearing or Trial	6
II. The Wisconsin Procedure for Obtaining Pre-Judgment Wage Garnishments Deprives Employees of Due Process of Law	13
CONCLUSION	22

PAGE

APPENDIX A:

Order to Show Cause 1a

Affidavit of Thomas M. Jacobson 2a

Order of County Court 3a

Notice of Appeal to Circuit Court 5a

Order of Circuit Court 6a

Notice of Appeal to Supreme Court 7a

Memorandum Decision of Circuit Court 8a

Opinion of Supreme Court of Wisconsin 17a

Dissenting Opinion of Supreme Court of Wisconsin 33a

Motion for Rehearing Denied 43a

APPENDIX B:

Statutory Provisions Involved 44a

Table of Authorities

Cases: PAGE

Byrd v. Rector, 112 W.Va. 192, 163 S.E. 845 (1932) 5, 19, 20

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) 14
Coffin Bros. v. Bennett, 277 U.S. 29 (1928) 14, 18
Coffin Bros. v. Bennett, 164 Ga. 350, 138 S.E. 670 (1927) 18

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) 15

Grannis v. Ordean, 234 U.S. 385 (1914) 15

Hovey v. Elliot, 167 U.S. 409 (1897) 15

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 15

McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928) 18, 20, 21

McKay v. McInnes, 279 U.S. 820 (1928) 18

Noble State Bank v. Haskell, 219 U.S. 104 (1911) 21

Ownbey v. Morgan, 256 U.S. 94 (1921) 17

Schroeder v. New York, 371 U.S. 208 (1962) 15

Windsor v. McVeigh, 93 U.S. 274 (1876) 15

Statutes:

Ark. Stats. Ann. §31-501 (1947) 16

Mont. Rev. Codes Ann. §93-4304 (1947) 16

Nev. Rev. Stat. §31.010 (1965) 7

PAGE

N. C. Gen. Stat. Ann. §1-440.2 (1963) 7

N. C. Gen. Stat. Ann. §1-440.3 (1963) 7

Ohio Rev. Code §2715.11 (1953) 7

S. D. Code §37.2802 (1939) 7

Tenn. Code Ann. §23-601 (1955) 7

Wis. Stat. Ann. §267.01 (1967 Pocket Part) 3

Wis. Stat. Ann. §267.02 (1967 Pocket Part) 3, 6, 7, 18

Wis. Stat. Ann. §267.04 (1967 Pocket Part) 6

Wis. Stat. Ann. §267.05 (1967 Pocket Part) 3, 6

Wis. Stat. Ann. §267.07 (1967 Pocket Part) 3, 7

Wis. Stat. Ann. §267.13 (1967 Pocket Part) 3

Wis. Stat. Ann. §267.16 (1967 Pocket Part) 3, 7

Wis. Stat. Ann. §267.18 (1967 Pocket Part) 3, 7

Wis. Stat. Ann. §267.20 (1967 Pocket Part) 3

Other Authorities:

Annunzio, Testimony to House Subcommittee on Consumer Affairs, Hearing on the Consumer Credit Protection Act (1967) 12

Bare, Testimony to House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967) 9, 11

Brunn, Wage Garnishment in California: A Study and Recommendations, 53 Cal. L. Rev. 1214 (1965) 12

Bureau of Labor Statistics, Fact Sheet No. 4-F, Debt Pooling and Garnishment in Relation to Consumer Indebtedness (1966) 12

PAGE

Caplovitz, The Poor Pay More (1967 ed.) 20

Fisher, How Garnisheed Workers Fare Under Arbitration, Monthly Labor Review (Dept. of Labor, May, 1967) 9

Gonzales, Con. Rec. (Feb. 1, 1968) 21

Halpern, Cong. Rec. (Feb. 1, 1968) 9

Jablonski, "Wage Garnishment as a Collection Device," 1967 Wis. L. Rev. 759 ..... 7, 8, 10

Jackson, Testimony to the House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967) 11

Jacob, Usage of Wage Garnishment and Bankruptcy Proceedings in Four Wisconsin Cities, address delivered to the American Political Science Association, September, 1966 9

Milwaukee Journal, December 10, 1966, §1, at 17, col. 4 10

National Industrial Conference Board Studies In Personnel Policy, No. 194 (1964) 10

Note, Garnishment in Kentucky—Some Defects, 45 Ky. L. J. 322 (1956) 9

President Lyndon Johnson, Message to Congress on Poverty, March 14, 1967 8

Report No. 1040, House Committee on Banking and Currency, 90th Cong., 1st Sess. (1967) 12

Report of the National Advisory Commission on Civil Disorders (Bantam ed. 1967) 6

Reuss, Cong. Rec. (Feb. 1, 1968) 13

Sullivan, Cong. Rec. (Feb. 1, 196[illegible] 11

Wirtz, Testimony to the House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967) 10

In the

Supreme Court of the United States

October Term, 1967

No. .....

Christine Sniadach,

Petitioner,

—v.—

Family Finance Corporation of Bay View and Miller Harris Instrument Company.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled case on December 8, 1967, rehearing of which was denied February 27, 1968.

Citation to Decisions Below

The order of the Milwaukee County Court of Wisconsin (R. 118-120) is unreported and is set forth in the appendix, *infra,* p. 3a. The memorandum decision of the Milwaukee Circuit Court of Wisconsin (R. 101-110) is unreported and is set forth in the appendix, *infra,* p. 8a. The decision of the Supreme Court of Wisconsin (R. 126-148) is reported at 37 Wis.2d 163, 154 N.W.2d 259 (1967), and is set forth in the appendix, *infra,* p. 17a.

Jurisdiction

The judgment of the Supreme Court of Wisconsin was entered on December 8, 1967 (R. 126). Rehearing was denied on February 27, 1968 (R. 150).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below, and asserting here, deprivation of rights secured by the Constitution of the United States.

Question Presented

Petitioner is a $65.00 per week wage earner. Half the wages due her were garnisheed before trial by plaintiff in a lawsuit against her. Under Wisconsin law, before petitioner's wages were garnisheed, she had no right to notice and hearing or other procedure for challenging the legality of the garnishment sought by plaintiff. The plaintiff did not have to show that without garnishment, he would be unlikely to obtain jurisdiction over petitioner or to collect a money judgment, nor did he have to show probable cause to believe that petitioner owed him any money, nor any other reason purporting to justify denial of notice and hearing. Does this procedure deny due process of law secured by the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Wis. Stats. Sections 267.01, 267.02, 267.05, 267.07, 267.13, 267.16, 267.18, 267.20 (1967 Pocket Part). They are set forth in the appendix *infra*, p. 44a.

Statement

Petitioner Christine Sniadach is a wage earner and resident of Milwaukee, Wisconsin. The Family Finance Corporation of Bay View (respondent here), alleging to be her creditor, commenced an action against her for $420.00 in the Wisconsin courts.[1] It also took advantage of the Wisconsin garnishment law, Wis. Stats. Sections 267.01 et seq., to garnishee the wages due her from her employer. All plaintiff did to garnishee petitioner's wages, and all it had to do, was file an attorney's affidavit with the clerk of the County Court, alleging that a summons had been issued in an action by plaintiff against defendant, and that the action was founded upon a promissory note. The statute does not require an allegation that the defendant is about to leave the jurisdiction, that an attachment is necessary to obtain jurisdiction, or that but for the garnishment the plaintiff may be unable ultimately to have execution upon a judgment, or any other reason purporting to justify denial of notice and prior hearing. The clerk of the court, on the basis of an attorney's affidavit, ordered petitioner's employer to withhold wages due petitioner.

On November 22, 1966, pursuant to the clerk's summons, petitioner's employer, the Miller Harris Instrument Co., withheld wages due petitioner in the sum of $31.59 and continues to withhold them. At no point has petitioner been granted a hearing on whether or not the garnishment was proper, and the statute affords her none until the main action is tried.

---

[1] The claim for $420.00 has not yet been decided because it has been stayed pending the outcome of this proceeding involving Wisconsin's pre-judgment garnishment law.

How the Federal Question Was Raised and Decided Below

Petitioner sought by order to show cause in the County Court to dismiss the garnishment on the ground that the Wisconsin procedure for pre-judgment garnishment deprived her of due process of law under the Fourteenth Amendment to the Federal Constitution. Her attorney alleged that the proceedings were "in violation of defendant's constitutional rights under . . . the United States Constitution, Fourteenth Amendment, in that defendant is being deprived of her property without due process of law." Affidavit of Thomas M. Jacobson, dated December 22, 1966 (R. 117). On January 7, 1967, Judge Thaddeus Pruss of the County Court held that "the garnishment action in the instant proceedings does not violate defendant's constitutional rights under . . . the United States Constitution 14th Amendment due process and equal protection" (R. 119).

On appeal to the Circuit Court of Milwaukee, petitioner argued that the garnishment statute "deprives the defendant of due process of law in violation of the fourteenth amendment to the United States Constitution because the defendant is given no hearing before being deprived of his property." The Circuit Court affirmed on March 15, 1967, stating that "[d]efendant's argument rejects the fact that nothing has happened to the defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff" (R. 105).

In the Supreme Court of Wisconsin, petitioner again argued that the garnishment procedure violated due process of law guaranteed to her by the Fourteenth Amendment to the Federal Constitution. On December 8, 1967,

the Supreme Court of Wisconsin affirmed the decision below holding that "Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law" (R. 134). The Court quoted with approval the language of *Byrd* v. *Rector*, 112 W.Va. 192, 163 S.E. 845 (1932):

> [A] defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon . . . Until [a final] judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp . . . (R. 134).

Two justices of the Wisconsin Supreme Court dissented, arguing that the reasoning of the majority was "most unrealistic. The constitutional question is not whether defendant has lost his title to the property, nor whether another has gained its beneficial use. The test is whether *he* was deprived of his property" (R. 141) (emphasis in original).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should be Granted to Review an Issue of National Importance: The Widespread Use of Pre-Judgment Wage Garnishments to Compel Wage Earners to Make Favorable Settlements With Their Alleged Creditors Without Hearing or Trial.

"Garnishment practices in many states allow creditors to deprive individuals of their wages through court action without hearing or trial. In about 20 states, the wages of an employee can be diverted to a creditor merely upon the latter's deposition, with no advance hearing where the employee can defend himself. He often receives no prior notice of such action and is usually unaware of the law's operation and too poor to hire legal defense." Report of the National Advisory Commission on Civil Disorders 276 (Bantam ed., 1968).

These words from the "Riot Commission" Report define the problem in this case. In a garnishment proceeding before judgment, a creditor or alleged creditor is permitted to cause the wages of his alleged debtor to be turned over to the court or held by the employer pending the outcome of the main litigation between creditor and debtor. In Wisconsin an alleged creditor may avail himself of this preliminary remedy simply by alleging that the debtor owes him a sum due under a contract, Wis. Stats., Sections 267.02, 267.04, 267.05; he need not allege that the defendant is a nonresident, or is about to leave the jurisdiction, or has no property in the state other than his wages, or that an attachment is necessary, or anything else purporting to justify denial of notice and prior hear-

ing in order to obtain jurisdiction over the defendant. The debtor-defendant need not be notified that his wages have been garnisheed until 10 days after the garnishment. Wis. Stats. Section 267.07. The validity of the garnishment may not be tested until after the main action between plaintiff and defendant is tried. Wis. Stats. Section 267.16. The wages for only one salary period are subject to garnishment, Wis. Stats. Section 276.02, and the defendant is entitled to receive from his employer a "subsistence allowance" of $25 or $40 if he has dependents (in no event to exceed 50% of the wages withheld), but this allowance is fixed at the specified levels regardless of whether the wages garnisheed are those owing for a week or a month. Wis. Stats. Section 267.18, and in any event, is "generally insufficient to support the debtor for any one week." Jablonski, "Wage Garnishment as a Collection Device," 1967 Wis. L. Rev. 759, 767. Of forty-one jurisdictions permitting some sort of pre-judgment garnishment, only seventeen states, including Wisconsin, permit alleged creditors to deprive workers of their earnings without either a prior hearing or the demonstration of some special circumstances justifying summary relief.[1] In these seventeen states, pre-judgment garnishment is used routinely by finance companies as a device to compel payments of debts; pre-judgment garnishment is more properly characterized as a collection device than as a provisional remedy. See

[1] In the other twenty-four jurisdictions, such garnishments are obtainable only upon a showing by the plaintiff that without the garnishment, his chance of collecting any judgment he might be awarded is small. In these jurisdictions, a plaintiff seeking to garnishee a defendant's wages must show that defendant is a non-resident, Ohio Rev. Code §2715.11, or that defendant has concealed himself with intent to avoid service, Gen. Stat. of N.C. §1-440.2-3, or that defendant has absconded, Nevada Revised Stats. §31.010, or that defendant has secreted his property with intent to defraud, Tenn. Code Annot. §23-601, or that he has no other property in the state, S. Dak. Code §37.2802.

Jablonski, "Wage Garnishment as a Collection Device," 1967 Wis. L. Rev. 759.

Garnishment as a Weapon for Collection

"Hundreds of workers among the poor lose their jobs or most of their wages each year as a result of garnishment proceedings. In many cases, wages are garnished by unscrupulous merchants and lenders whose practices trap the unwilling workers." President Lyndon Johnson, Message to Congress on Poverty, March 14, 1967. A significant amount of study has been done on the use and effect of garnishment, and the results indicate that the President's message is, if anything, an underestimation of the seriousness of the problem. One study focused on the use of garnishment in four Wisconsin cities, and found that garnishment (particularly pre-judgment garnishment) is used not only to secure payment of sums legitimately due, but to force alleged debtors to pay without contesting the debts in court.

> In the four cities studied, money lenders (principally finance companies) and retailers were the two heaviest users of wage garnishments . . . Finance companies have the most developed system of collecting delinquent accounts. Within 10 days after a payment is due, they consider the debtor delinquent and begin efforts to collect. They make use of a large repertoire of collection methods including overdue notices, telephone calls to his employer, calls to cosigners of his note (if any), repossession of the article purchased with the loan (if any), and then wage garnishment. . . . When all other means of reaching the debtor have failed, garnishments usually succeed in forcing him to contact the creditor because he finds himself completely out of funds and his job endangered. Many

creditors will release the pay check to the debtor after a token payment plus the promise of modest weekly payments until the debt is repayed. The threat of another garnishment is used to force the debtor to complete his payments. H. Jacob, Usage of Wage Garnishment and Bankruptcy Proceedings in Four Wisconsin Cities, address delivered to the American Political Science Association, September, 1966, pp. 7, 10.

Garnishment is an effective weapon in the arsenal of the finance companies not only because "the individuals whose wages are being garnished are the very individuals whose total wages are required for the payment of necessary living expenses: food, clothing, shelter, and medical expenses,"[3] but also because of the widespread practice among employers of firing workers whose wages are garnisheed. "The debtor often may find himself unemployed; employers are often unwilling to accept the additional expense of administering garnishments." Remarks of Congressman Halpern, Cong. Rec., p. H689 (Feb. 1, 1968). "Some companies regard a single garnishment as grounds for discharge . . . it is detested as an unmitigated nuisance by employers to such an extent that even union contracts tacitly or specifically recognize the right of an employer to discharge an employee whose debts result in more than a prescribed number of garnishments within a specified period." Note, Garnishment in Kentucky —Some Defects, 45 Ky. L. J. 322, 330 (1956). See Fisher, How Garnisheed Workers Fare Under Arbitration, Monthly Labor Review (Dept. of Labor, May 1967). Be-

[3] Testimony of Clive W. Bare, Referee in Bankruptcy, Eastern District of Tennessee, to House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967).

tween 100,000 and 300,000 American workers are fired from their jobs each year as a result of wage garnishments. Testimony of Secretary Willard Wirtz to the House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act, p. 739 (1967). Thirteen percent of American manufacturing firms fire workers whose wages are garnisheed even once. National Industrial Conference Board Studies In Personnel Policy, No. 194, p. 38, Table 40 (1964). A study of garnishments in Wisconsin showed that 41% of employees in the sample were warned of dismissal if they were again garnisheed; 11% were fired forthwith, and in only 15% of the cases did the employers try to help the workers. Jablonski, "Wage Garnishment as a Collection Device," 1967 Wis. L. Rev. 759, 766, n. 29.

The most gross injustices in cases of discharge as a result of garnishment occur when the garnishments are of the pre-judgment type; there the defendant may have a perfectly good defense to the main lawsuit, or may not even be a debtor, but because he is denied a prior hearing he is threatened with being fired before he can contest the validity of the garnishment. It does not matter to the employer that the worker is innocent—the nuisance to the employer and his bookkeepers is as great. Only by settling immediately with the plaintiff can the employee remove the garnishment and retain his job security.[4]

Furthermore, in a significant proportion of the cases, the underlying debt is subject to a good defense, such as fraud, but the debtor is never able to raise this defense because he cannot afford to wait until trial. "What we

[4] Cases have been documented in which employees were fired as soon as their wages were garnisheed, and were able later, at trial, to show that they were not liable. *Milwaukee Journal*, December 10, 1966, §1, at 17, col. 4, cited in Jablonski, *supra*, at 769, n. 42.

know from our study of this problem [in the hearings of the House Subcommittee on Consumer Affairs] is that in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in an easy credit nightmare in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." Remarks of Congresswoman Leonor Sullivan, Chairlady of the House Subcommittee on Consumer Affairs, Cong. Rec. p. H688 (Feb. 1, 1968). Garnishment "is mainly the weapon not of the honest merchant or lender but of the predatory credit sellers who hook a poor, ignorant worker on credit terms which are as devastating to that worker as the dope habit —something he can never seem to lick . . . [W]eep for the inhumanity exposed [in our hearings] about the sewer of the so-called easy credit racket—not legitimate business but the blood suckers of commerce." *Ibid.*

Garnishment and Personal Bankruptcies

It has been established beyond doubt that garnishment —and the accompanying threat of loss of employment— is the triggering cause of most bankruptcies in the United States.[5] Federal bankruptcy referees have found upon examination of creditors and debtors that "between 60 and 70 percent of bankruptcy filings are the direct result of wage garnishments. Many individuals are being driven into bankruptcy who actually owe relatively small sums, but whose wages are under attachment." Testimony of

[5] In Fiscal 1967, there were 208,329 bankruptcies filed in United States District Courts. Testimony of Royal E. Jackson, Chief, Bankruptcy Division, Administrative Office, U. S. Courts, to the House Subcommittee on Consumer Affairs, p. 416 (1967). 92% of them were filed by consumers rather than businesses. *Ibid.*

Clive W. Bare, Referee in Bankruptcy, Eastern District of Tennessee, to House Subcommittee on Consumer Affairs, Hearings on Consumer Credit Protection Act, p. 415 (1967). A direct correlation has been found between the harshness of state garnishment laws and the incidence of filings in bankruptcy.[6] Bureau of Labor Statistics, Fact Sheet No. 4-F, Debt Pooling and Garnishment in Relation to Consumer Indebtedness (1966); see Brunn, Wage Garnishment in California: A Study and Recommendations, 53 Cal. L. Rev. 1214 (1965).

In short, the garnishment procedure is a harsh device used largely by finance companies to collect debts without having to submit to a full hearing in court. Garnishments are a great hardship to wage earners, who cannot afford to lose even 10% or 15% of their wages and still maintain their families, and who are threatened in many instances with being fired if they do not settle with their alleged creditors. As one member of the House Committee on Banking and Currency has stated, "[G]arnishment is an expensive, painful procedure which can cost a man's job. This has come to the attention of this Committee as many other Members of Congress. The reports on the riots in Watts, Chicago and other cities, indicate that it costs people their lives." Congressman Frank Annunzio, in House Subcommittee on Consumer Affairs Hearings on Consumer Credit Protection Act, p. 104 (1967). And prejudgment garnishment, by which perfectly innocent em-

[6] "In States such as Pennsylvania and Texas, which prohibit the garnishment of wages, the number of nonbusiness bankruptcies per 100,000 of population are nine and five, respectively, while in those States having relatively harsh garnishment laws, the incidents of personal bankruptcies range between 200 to 300 per 100,000 population." Report No. 1040, House Committee on Banking and Currency, 90th Cong., 1st Sess., p. 21 (1967).

ployees can be subjected to all the pains and penalties of wage attachments before they are given a chance to say a single word in their own defense, is the harshest type of garnishment. As a Wisconsin Congressman has stated, "The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level." Remarks of Congressman Henry Reuss, Cong. Rec., p. H688 (1968).

Petitioner asks that this Court grant the writ prayed for, because pre-judgment garnishment of petitioner's wages is not only an "inhuman doctrine"; it is an unconstitutional deprivation of due process of law secured by the Fourteenth Amendment.

II.

The Wisconsin Procedure for Obtaining Pre-Judgment Wage Garnishments Deprives Employees of Due Process of Law.

The petitioner raises issues concerning only one feature of the Wisconsin garnishment procedure: Without notice or hearing it permits wages to be garnisheed before a judgment in the main action and without any showing by the plaintiff that he is probably entitled to the money or that unless the wages are attached, he will be unable to obtain jurisdiction over the defendant or execution in satisfaction of a potential judgment, and without any other purported justification. This case does not involve a claim that the common procedure of wage garnishment after judgment is unconstitutional, for with regard to that situation, there has been at least a finding that the defendant is indebted to the plaintiff. Petitioner does

maintain, however, that pre-judgment garnishments in Wisconsin are unconstitutional because wage-earners are given no prior hearing to contest the probable existence of the debt, the need of the plaintiff for security, or the validity under state law of the proposed garnishment.[7]

We start with the proposition that no one may be deprived of property by state action unless first given notice and opportunity to be heard. For example, this Court has struck down a Florida procedure whereby the judgment creditor of a corporation could issue an execution against the property of the owner of unpaid stock, without giving that owner notice or a prior hearing. The owner was held to be "entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1915). Absent a prior hearing, the attachment was "repugnant to the 'due process of law' provision of the 14th Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation . . ." *Ibid.*

---

[7] Petitioner submits that a post-garnishment hearing is adequate protection for alleged debtors in those few cases where the plaintiff swears that notice of a hearing before the attachment would cause the defendant to flee the jurisdiction or remove his assets. This will hardly ever occur, since the defendant's job and continuing source of income will always be in the jurisdiction in question in these cases. In any event, the hearing must take place with reasonable promptness, and not be deferred until the trial of the main action, as in Wisconsin. If opportunity for a prompt hearing after such a garnishment existed, the attachment would become "a mode only of commencing . . . suits" and would be constitutionally permissible. *Coffin Bros.* v. *Bennett*, 277 U.S. 29, 31 (1928).

The requirement of notice[8] and the opportunity to be heard before a deprivation of property is one of the essential features of the American legal process. As Mr. Justice Frankfurter said in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 164 (1951), notice and hearing are "prerequisite to due process in civil proceedings." As recently as *Schroeder* v. *New York*, 371 U.S. 208, 212 (1962), this Court has held the right to be heard in civil litigation to be "one of the most fundamental requisites of due process," and has even deemed it to be "the fundamental requisite" of due process, *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). See also, *Windsor* v. *McVeigh*, 93 U.S. 274, 277, 278 (1876); *Hovey* v. *Elliot*, 167 U.S. 409 (1897).

There might be some circumstances, not present here, which might justify an attachment of a defendant's property before judgment and before any hearing. If there is some evidence that even notice of the hearing may itself have adverse consequences for the plaintiff, it is reasonable to permit the attachment to be followed by, rather than preceded by, a hearing for the defendant. If, for example, the plaintiff swears that he has a basis for believing that the defendant was about to flee the jurisdiction of the state, or was removing his assets from the state, it would be reasonable to permit a summary attachment. See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950). Such an attachment could particularly be justified if the alleged creditor had to post a bond to protect the debtor from loss caused by an improper garnish-

[8] Under the Wisconsin procedure, not even prior *notice* of the garnishment proceeding is given to the wage earner; he need not be served with the garnishment summons until ten days after his employer is instructed to withhold the wages.

ment,[9] or if the debtor could recover damages from a creditor who falsely and maliciously swore that he had reason to believe the debtor would flee the jurisdiction before judgment. But Wisconsin requires no bond, or even a sworn statement of need for summary process.[10]

Wisconsin provides workers threatened with garnishment no prior hearing, requires no showing that a plaintiff needs emergency summary relief, and then provides wage earners no hearing at all until the trial (perhaps years after the garnishment) of the main action. The statute permits garnishment of the wages of domestic residents, such as petitioner, without any requirement that the plaintiff show or even allege that his ultimate recovery is in jeopardy. Yet few wage-earners are likely to flee the state upon being sued, and as a practical matter, it is impossible (or nearly so) to transfer from the jurisdiction the wages due from one's employer.

We have, therefore, in the Wisconsin procedure, the practice of denying wage-earners the sums due them, without either any adversary process or a special justification for summary procedure. The only way in which the Wisconsin Supreme Court was able to hold such a procedure constitutional was to hold that a "temporary deprivation"

---

[9] Some of the seventeen states permitting pre-judgment garnishment without a showing of need for summary relief do require a plaintiff's bond to protect the wage earner. See e.g., Mont. Rev. Code §93-4304; Ark. Stat. Annot. §31-501 (double bond). Due process might require that summary relief be permitted only upon both a showing of need and a bond to protect the wage-earner. Wisconsin requires neither of a plaintiff.

[10] Even where a plaintiff filed a sworn statement of need in order to obtain a summary garnishment without a prior hearing, there seems no justification for denying the defendant the right to a subsequent but prompt hearing, and affording him the opportunity to dissolve the attachment by showing that the plaintiff was wrong —that the wage-earner was not in fact preparing to leave or remove his assets from the state.

of property is not a "deprivation" of property. In support of this proposition, it cited three Supreme Court decisions. But it may be seen that these decisions, none of which involved the attachment or garnishment of wages, are more properly viewed as cases dealing with special justifications of summary attachment, and that the due process clause of the Constitution is concerned with realities and not with word-play. The first case cited in the opinion of the Wisconsin Supreme Court is *Ownbey* v. *Morgan*, 256 U.S. 94 (1921). But there the defendant resided in a foreign state. This Court justified the pre-judgment attachment on this basis:

> Hence it naturally came about that the American colonies and states, in adopting foreign attachment as a remedy for collecting debts due from *nonresident or absconding debtors*, in many instances made it a part of the procedure that if the defendant desired to enter an appearance and contest plaintiff's demand, he must first give substantial security . . . . A property owner *who absents himself from the territorial jurisdiction of a state*, leaving his property within it, must be deemed ex necessitante to consent that the state may subject such property to judicial process or to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. 256 U.S. at 105-111 (emphasis added).[11]

---

[11] Other language in the *Ownbey* case indicates that this Court could not have intended that the principle it was adopting with regard to foreign debtors should apply to wage garnishments even of foreign wage earners. The Court used the term "property" not in its legal sense but in the ordinary sense of "substantial wealth":

> Ordinarily [the requirement that a debtor post bond to dissolve an attachment] is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation must be regarded as a permissible condition. 256 U.S. at 111.

Coffin Brothers v. *Bennett*, 277 U.S. 29 (1928), is likewise no authority for the opinion of the Wisconsin Supreme Court. Justice Holmes, writing for the Court, approved a Georgia procedure for the attachment of the stock of liquidated banks. The stock could be attached prior to any hearing on the propriety of the attachment, even though the stockholders were domestic residents. But the opinion of the Georgia Supreme Court makes clear that attachment in such cases had a very special purpose: the attachment was necessary in order for plaintiffs to obtain jurisdiction over defendants.[12] But plaintiff in the instant case did not need to garnishee defendant's wages to obtain jurisdiction over her; he had in personam jurisdiction.[13]

The final authority relied upon by the majority below is *McKay* v. *McInnes*, 279 U.S. 820 (1928), a memorandum decision affirming *McInnes* v. *McKay*, 127 Me. 110, 141 A. 699 (1928), holding Maine's attachment before judgment statute not unconstitutional. The significance of *McKay*, as applied to the present case, however, must be open to some question. *McKay* was submitted on agreed facts to the Maine Supreme Court, and it nowhere appeared whether or not the defendant was a resident of Maine.

---

[12] "[The statute] does not provide for rendition of judgments *in personam* against the stockholders of banks which the superintendent of banks has taken control of for the purpose of liquidation, but provides only for summary issuance of executions against stockholders of such banks, as a mode only of commencing against them suits . . . ." 164 Ga. 350, 138 S.E. 670, 671 (1927).

[13] Indeed, it is somewhat hard to discern what legitimate purpose underlay plaintiff's decision to garnishee petitioner's wages. It did not need the garnishment for jurisdictional purposes, and petitioner was a domestic resident with roots in the community, including local employment. The amount of the garnishment was only $31.59, which in any event could not afford the plaintiff much security on his alleged $420.00 debt, particularly in view of the fact that Wisconsin law permits an alleged creditor to garnishee wages for one pay period only. Wis. Stats. §267.02(b)(2).

This Court's citation of *Ownbey* as authority for its affirmance, and its failure to write an opinion, suggests that the Court may have thought that the facts underlying *McKay* were essentially the same as those underlying *Ownbey*. But in the present case, the Court is presented for the first time with the question of the validity of a pre-judgment attachment (in this case a wage garnishment) on the basis of a record showing that the defendant's residence and place of employment were within the jurisdiction in which the plaintiff brought his suit, and there is therefore little or no justification for depriving the defendant of his property without any showing of probable cause or opportunity for a prior hearing.[14]

Furthermore, the applicability to this case of precedents dating even from the 1920's must be subject to some question. The precedents cited by the Wisconsin Supreme Court were suited to borrowers and lenders of substantial wealth. Debtors who had one bank account attached were likely to have others on which they could draw, or other sources of capital; an attachment did not deprive them of their only source of income. Only since the end of World War II has America become a consumer credit economy, in which, quite acceptably, wage-earners are regularly in

[14] *Byrd v. Rector*, 112 W.Va. 192, 163 S.E. 845 (1932), is a fourth case cited by the Wisconsin Supreme Court which involved a nonresident defendant sued by an infant plaintiff for having negligently disposed of a dynamite cap. The Supreme Court of West Virginia upheld the constitutionality of the attachment, without prior hearing, of the defendant's property. It may be presumed that it would be difficult to collect a judgment from a nonresident. But that precedent was improperly extended by the Wisconsin Supreme Court to permit garnishment of petitioner's wages; the plaintiff here did not allege that the security of any eventual judgment might be impaired, and since petitioner is a resident, with employment in Wisconsin, it cannot be presumed she would flee her job and the State if plaintiff were successful in its suit for $420.00.

debt. The outstanding installment debt has grown from 2.5 billion dollars in 1945 to 75 billion dollars in 1967, and will exceed 100 billion dollars by 1970. Caplovitz, *The Poor Pay More*, xvi (Preface to 1967 edition). Petitioner submits that the application to garnishments in the 1960's of rules of law formulated to govern attachments in the 1920's further warrants issuance of the writ prayed for, even were it not for the fact that the 40 year old cases are all distinguishable.

The remaining argument, then, supporting the validity of the garnishment is that employees whose wages are garnisheed are not "deprived" of their property because the "deprivation" is merely temporary; the wages are held in escrow until the plaintiff's main case is tried, and if the plaintiff is not successful, the garnishment is dissolved.[15]

But the due process clause of the Fourteenth Amendment addresses itself not to "drily logical" analysis or

---

[15] This reasoning was relied upon by two supreme courts besides that of Wisconsin, although Wisconsin's is the only Supreme Court to apply it to wage garnishment. The Supreme Court of West Virginia has reasoned:

> The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. [Until final judgment] there has been no deprivation of property . . . Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp. Under no circumstances could it be converted into cash and applied to the plaintiff's demand prior to final adjudication of the merits of the controversy between plaintiff and defendant. *Byrd v. Rector*, 112 W.Va. 192, 163 S.E. 845 (1932).

And the Supreme Court of Maine, while conceding that "Deprivation does not require actual physical taking of the property or thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will are affected," upheld pre-judgment attachment by adding "yet conditional and temporary it is." *McInnes* v. *McKay*, 127 Me. 110, 116, 141 A. 699, 702 (1928).

"scholastic interpretation," see *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110 (1911), but to realities. And nothing is more real to a wage earner whose wages have been garnisheed than impairment of his ability to care for his family and meet the demands of his other creditors. It matters little that the plaintiff has no use of the defendant's wages; the important fact is that the defendant has no use of them. And, unlike attachment of stock or other assets of a wealthy man, loss of wages to a wage earner is likely to result in a financial squeeze seriously affecting his power to feed, clothe and shelter his dependents.[16] Nor is the "temporary" nature of the deprivation a satisfactory response; given the time required for discovery and the crowded condition of court dockets, it may be years before the main action comes to trial. During this period, the wage earner loses the difference—measurable as interest—between the present and future value of the wages due him. More important, the garnishment, valid or not, keeps a defendant under pressure to settle the lawsuit on terms favorable to the alleged creditors, even if he has a perfect defense. It is no comfort to a wage earner that, like any attachment, a garnishment "does not destroy title or the right to sell. Until a sale of execution, the debtor has full power to sell or dispose of the property attached without disturbing the possession (in case of personalty) or rights acquired by the attachment." *McInnes* v. *McKay*, 127 Me. 110, 115, 141 A. 699, 702 (1928). Even in jurisdictions which do not forbid wage assignments, there is no real market for wages

[16] "For a poor man—and whoever heard of the wages of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy, and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense in such a process?" Remarks of Congressman Gonzales, Cong. Rec. p. H690 (Feb. 1, 1968).

currently attached, which the alleged debtor may never become entitled to. The Wisconsin Supreme Court's conception of what constitutes a "deprivation" of property is archaic and unrealistic, ignoring the difference in value between a sum of money and the right to future possession of that sum. It prevents thousands of wage earners each year from receiving the fair play to which our legal system entitles them. Petitioner submits that this Court should grant the writ in order to apply the requirements of the Due Process Clause to the process of pre-judgment garnishment as it operates in Wisconsin.

CONCLUSION

Wherefore, petitioners pray that the petition for writ of certiorari be granted and the judgment below reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
LEROY D. CLARK
GABRIELLE A. KIRK
PHILIP G. SCHRAG
10 Columbus Circle
New York, New York 10019

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Attorneys for Petitioner

WILLIAM F. YOUNG, JR.
Of Counsel

APPENDIX A

Order to Show Cause

(Formal Parts Omitted)

Upon the Affidavit hereto annexed and upon all the records, files and proceedings had and on motion of Barbee & Jacobson, defendant's attorneys;

IT IS ORDERED, that the above named plaintiff, Family Finance Corporation of Bay View appear before the Honorable Thaddeus J. Pruss, County Judge in and for Milwaukee County, Room 403, in the Courthouse, at 901 North 9th Street, City of Milwaukee, County of Milwaukee, State of Wisconsin, on the 3rd day of January, 1967, at 9:00 o'clock A.M. or as soon thereafter as counsel can be heard to show cause why the garnishment proceedings in the above matter should not be dismissed on the merits for violating defendant's rights under the Wisconsin Constitution, Article 1, Section 9; and further defendant's due process and equal protection rights under the United States Constitution 14th Amendment.

IT IS FURTHER ORDERED, that a copy of this Order to Show Cause, together with a copy of the Affidavit hereto annexed, be served upon the above named plaintiff at least 48 hours prior to the time set for hearing herein.

Dated at Milwaukee, Wisconsin, this 23rd day of December, 1966.

/s/ T. J. PRUSS
County Judge

Affidavit of Thomas M. Jacobson

STATE OF WISCONSIN,
COUNTY OF MILWAUKEE, ss.:

THOMAS M. JACOBSON, being first duly sworn on oath deposes and says:

1. That on the 21st day of November, 1966 the plaintiff commenced an original action and garnishment proceedings against the defendant herein;

2. That plaintiff as a result of said garnishment action against defendant is responsible for the garnishee defendant in said matter holding $31.59 due defendant for wages;

3. That plaintiff has not legally established that defendant in fact owes plaintiff any amount of money nor reduced said claim to a valid judgment.

That the defendant's attorney makes this affidavit for the purpose of obtaining an Order directing the plaintiff to show cause why the garnishment action in the instant proceedings should not be dismissed for being in violation of defendant's constitutional rights under the Wisconsin Constitution, Article 1, Section 9 and the United States Constitution, 14th Amendment in that defendant is being deprived of her property without due process of law and further Wisconsin Statutes Chapter 267 permitting garnishment before judgment of a wage earner's salary treats said class unequally in comparison to other individuals similarly situated; that for said reason your Affiant asks the Court to declare Wisconsin's garnishment law before judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 unconstitutional for the aforesaid reasons.

/s/ THOMAS M. JACOBSON
THOMAS M. JACOBSON

Order of County Court

(Formal Parts Omitted)

WHEREFORE an Order to Show Cause returnable before the Honorable Thaddeus J. Pruss of the County Court requiring the plaintiff to show cause why the garnishment proceedings in the above matter should not be dismissed on the merits for violating the defendant's rights under the Wisconsin Constitution, Article 1, Section 9 and further defendant's due process and equal protection rights under the United States Constitution 14th Amendment was signed by the Honorable Thaddeus J. Pruss December 23, 1966;

WHEREFORE Affidavit of defendant's counsel attached thereto indicated plaintiff commenced an original action and garnishment proceeding against defendant herein and pursuant thereto the garnishee defendant held $31.59 due defendant for wages;

WHEREFORE Affidavit of defendant's counsel attached thereto further indicated plaintiff had not legally established that defendant in fact owed plaintiff any amount of money nor reduced said claim to a valid judgment therefore defendant attorney's affidavit requested the Court to Order the plaintiff to show cause why the garnishment action in the instant proceedings should not be dismissed for being in violation of defendant's constitutional rights under the Wisconsin Constitution, Article 1, Section 9 and the United States Constitution, 14th Amendment in that defendant is being deprived of her property without due process of law and further Wisconsin's Statutes Chapter 267 permitting garnishment before judgment of a wage earner's salary treats said class unequally in comparison to other individuals similarly situated; that for said reason your Affiant asks the Court to declare Wisconsin's garnishment law before judgment, more particularly Sections

267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 unconstitutional, for the aforesaid reasons;

WHEREFORE a hearing was held pursuant to the Order to Show Cause before the Honorable Thaddeus J. Pruss, January 3, 1967 at 9:00 A. M. in his Courtroom in the Courthouse at Milwaukee, Wisconsin;

WHEREFORE at said hearing the plaintiff appeared by counsel Sheldon D. Frank and defendant appeared by counsel Thomas M. Jacobson;

Upon all the records, pleadings, and files herein it is

NOW THEREFORE ORDERED:

That the garnishment action in the instant proceedings does not violate defendant's constitutional rights under the Wisconsin Constitution, Article 1, Section 9 and the United States Constitution 14th Amendment due process and equal protection;

That the said determination is for the legislature and not for the Court;

That Wisconsin's garnishment law before judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 is therefore not unconstitutional.

That defendant's attorney requests a stay in the garnishment action for purposes of appeal therefore the Court further Orders that all proceedings in the instant garnishment action be and hereby are temporarily stayed until further Order of this Court.

Dated at Milwaukee, Wisconsin, this 7th day of January, 1967.

/s/ THADDEUS J. PRUSS
THADDEUS J. PRUSS, *County Judge*

Notice of Appeal to Circuit Court

(Formal Parts Omitted)

PLEASE TAKE NOTICE that the defendant, Christine Sniadach, does hereby appeal to the Circuit Court of Milwaukee County, State of Wisconsin from the order made herein on the 6th day of January, 1967, by the Honorable Thaddeus J. Pruss, County Court Judge, which Order refused to dismiss the garnishment action herein on the basis the Wisconsin garnishment before judgment laws; to-wit, Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 did not deprive defendant of her constitutional rights under the Wisconsin Constitution, Article 1, Section 9, and the United States Constitution 14th Amendment due process and equal protection.

Dated at Milwaukee, Wisconsin this 9th day of January, 1967.

/s/ THOMAS M. JACOBSON
BARBEE & JACOBSON
MARTIN R. STEIN
Defendant's Attorneys

Order of Circuit Court

(Formal Parts Omitted)

The appeal in this action having been brought before the Honorable George D. Young, Judge of the Circuit Court in and for Milwaukee County, and pursuant to Stipulation of the parties, judgment rendered after filing of briefs by both parties,

NOW THEREFORE, upon motion of Sheldon D. Frank, attorney for the respondent, Family Finance Corporation of Bay View,

IT IS HEREBY ORDERED:

That the judgment of the Honorable Thaddeus J. Pruss, Judge of the County Court, in favor of said respondent, Family Finance Corporation of Bay View and against the appellant, Christine Sniadach, alias, as rendered and entered on the 3rd day of January, 1967, holding that said action, a garnishment issued before the suit was instituted was constitutional and did not violate the due process and equal protection right of the appellant-defendant, be and same hereby is affirmed.

Dated at Milwaukee, Wisconsin, this 18th day of April, 1967.

/s/ GEORGE D. YOUNG
Judge of the Circuit Court

Approved this 4th day of April, 1967
/s/ THOMAS M. JACOBSON
THOMAS M. JACOBSON, *Attorney for Def.*

Notice of Appeal to Supreme Court

(Formal Parts Omitted)

PLEASE TAKE NOTICE that the defendant-appellant, Christine Sniadach, does hereby appeal to the Supreme Court of the State of Wisconsin from the Order entered herein on the 18th day of April, 1967 by the Honorable George D. Young, Circuit Court Judge In and For Milwaukee County Branch Number One thereof, which Order affirmed the judgment of the Honorable Thaddeus J. Pruss, County Judge In and For Milwaukee County, Branch Number Six thereof, said judgment holding Wisconsin's garnishment before judgment statutes constitutional and not in violation of defendant-appellant's equal protection and due process guarantees.

Dated this 18th day of April, 1967.

/s/ THOMAS M. JACOBSON
THOMAS M. JACOBSON
Defendant-Appellant's Attorney

To: SHELDON D. FRANK, ESQ., *Plaintiff's Attorney,*
135 West Wells Street,
Milwaukee, Wisconsin
CLERK OF CIRCUIT COURT, Milwaukee
County, Milwaukee, Wisconsin

Memorandum Decision of Circuit Court

(Formal Parts Omitted)

Prefatory

This is an appeal from Branch 6 of the County Court of Milwaukee County. The plaintiff above named commenced a garnishment action against the defendant and named the Miller Harris Instrument Co. garnishee. Thereafter, the defendant moved the Court below by way of an order to show cause requesting the dismissal of the action upon the ground that the proceeding violated the defendant's rights under Article I, Section 9, of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution.

The defendant appears now to have abandoned her contention that there has been a violation of Article I, Section 9, of the Wisconsin Constitution and now contends that the proceeding has violated her rights under Article VII, Section 2, of the Wisconsin Constitution.

Memorandum Decision

I

Article VII, Section 2, of the Wisconsin Constitution.

Section 2 of Article VII provides in part that "The judicial power of this state both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, . . ."

The basis for this argument is that Chapter 267 contains a presumption made by the legislature that in all disputes between a creditor and his alleged debtor the creditor will prevail and the debtor must automatically prepare for sat-

isfaction of the creditor's claim through immediate seizure of his property. It is argued that the plaintiff need only file the summons and complaint with the clerk who is then automatically required to issue what purports to be "an order of the County Court," although it commands not merely an appearance but disposes of the property, and that no judge is involved in any way in this process up to this point. This argument concludes that all authority to act in a preliminary dispute involving particular litigants has been withdrawn from the Court and is in effect decided by the legislature.

The foregoing argument does violence to the provisions of Chapter 267, Wis. Stats. It is true that the legislature has afforded a remedy not known to the common law for the protection of creditors. The remedy provided simply requires that the garnishee complaint must allege the existence of one of the grounds for garnishment, the amount of the plaintiff's claim, above all offsets, known to the plaintiff, and that the plaintiff believes the garnishee is indebted to or has property in his possession or under his control belonging to the defendant and that such indebtedness or property is not exempt from execution (Sec. 267.05 (1)).

Chapter 267 further provides that the garnishee summons and complaint shall be served on the principal defendant not later than 10 days after service on the garnishee as provided in Sec. 262.06 (Sec. 267.07). If the answer of the garnishee shows a debt due the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, with interest and costs, to the clerk of the court. There is the further provision that the plaintiff may request the garnishee in writing to pay such sum to the clerk, and the garnishee must, within 5 days after receipt of such request, pay the sum to the clerk who then

issues his receipt to the garnishee who is thereby released of all liability (Sec. 267.13). However, no trial is had in the garnishment action until the plaintiff has judgment in the principal action, which is dismissed in those cases in which judgment goes for the defendant (Sec. 267.16).

Wisconsin has held that garnishment before execution is a provisional remedy. *Mahrle* v. *Engle*, 261 Wis. 485. The Court is unable to find Wisconsin authority that directly rebuts the defendant's attack on Chapter 267 of the statutes, but it has long been held that a state may by appropriate legislation authorize the attachment or garnishment of property within its borders, subject to the limitations of the federal and state constitutions. An attachment or garnishment is not a deprivation of property without due process of law within the meaning of constitutional provisions, inasmuch as there must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim. Sec. 267.16 (1) does that very thing.

So far as the payment into court is concerned, no judicial process seems to be involved. The payment amounts to nothing more than a ministerial act to relieve the garnishee defendant of litigation and the funds come into the possession of the court in *custodia legis*, and until adjudication in the main action has occurred nothing more than a temporary deprivation has occurred. That deprivation is of statutory creation in favor of the creditor which was in existence at the time the debt was created. In this connection the language of *Byrd* v. *Rector*, 112 W.Va. 192, 81 A.L.R. 1213, 1216, is particularly appropriate:

> "We think the answer to these propositions is that a defendant is not deprived of his property by reason

of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process. In the meantime, there has been no deprivation of property. The attachment, quasi rem in nature, has operated only to detain the property temporarily, to await final judgment on the merits of plaintiff's claim. No constitutional right is impaired. *McInnes* v. *McKay*, 127 Me. 110, 141 A. 699. Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp."

The Court does not believe there is any need for a judicial act until the defendant's liability to the plaintiff is before the Court.

II

Deprivation of Property Prior to Notice

Defendant argues that her property can be taken before she receives notice of the garnishment proceeding. This, of course, is based on the provisions set forth in Sec. 267.07 (1) which provide for service of a copy of the gar-

nishee summons and complaint or a notice of such service be served not later than 10 days after service on the garnishee. It is argued that the garnishee defendant cannot only withhold defendant's wages but can file an answer asserting that he owes wages to the defendant and simultaneously pay a substantial portion of those wages to the clerk before any notice of the proceeding is given to the defendant. The argument concludes by stating that the defendant is given inadequate notice because such notice as he gets comes after the purpose of the garnishment is a fully accomplished fact. This is an erroneous view of the process.

The timeliness of the notice is truly the basis of the defendant's lament. The important fact, however, is that the defendant does have notice even though it may be given after his property is in *custodia legis*. Defendant's argument rejects the fact that nothing has happened to the defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff. The argument would deprive the garnishee defendant of a means whereby involvement in litigation might be terminated in order that a defendant who contracted a debt with the provisional remedy in existence may have the use of his property.

Whether a debtor should be relieved of garnishment while an action for debt is pending is one involving legislative or public policy. When the legislative purpose has been declared in unmistakable language, it is not within the province of the Court to interpose contrary views of what the public need demands. *Wait* v. *Pierce*, 191 Wis. 202. And the courts have nothing to do with the policy of laws, their only duty is to interpret the laws as enacted

by the legislature. *Waldum* v. *Lake Superior T. & T. R. Co.*, 169 Wis. 137.

III

No Hearing Before Deprivation of Property

The thrust of the defendant's argument on this point is that she is not afforded the right to challenge the withholding of her wages prior to judgment in the main action and that she loses her property solely upon the service of summons and verified complaint in the garnishment action. This argument amounts to a paraphrasing of the second argument. Since the provisional remedy is constitutionally allowable a legitimate basis for garnishment exists. The argument that defendant is afforded no challenge to the withholding of her wages is *ad hominem*. If the main action falls, so then does the garnishment and no property belonging to the defendant is lost.

The debt was contracted with the provisional remedy in existence and became part of the contract. To deprive the plaintiff of that remedy would be an impairment of contract and constitutionally bad.

Defendant further argues that the main action involves a promissory note and since plaintiff's attorney is not personally privy to all the facts he should not be allowed to verify the complaint and the plaintiff should be required to personally verify the complaint. Just how this invades the defendant's constitutional rights is not made clear. Certainly the defendant has adequate statutory remedies, both investigative and procedural, which furnish an adequate basis for the protection of her rights.

IV

Violation of Due Process Because Lack of Notice Is Not Conditioned On Need For Summary Process

Defendant argues that absent a claim that a defendant is about to leave the employ of the garnishee, or is about to flee the state entirely, the employee's wages are a continuing asset against which the plaintiff can proceed even after judgment; that such an exercise of jurisdiction is normally authorized only where jurisdiction may not be established in any other manner or the defendant is taking steps which may frustrate the plaintiff's judgment.

It is supposed that garnishment was a legislative incentive for the extension of credit. A means whereby a seller might protect himself against persons not well known to him. Whatever the purpose, the legislature provided the remedy, and the defendant contracted her debt with the right of garnishment on the plaintiff's side. Defendant's argument begs the very reason for the statute. Whether the reason for the statute still exists or has ceased to exist is a matter for legislative determination.

V

Unconstitutional Interference With Appellant's Right To Gainful Employment—Violation of the Fourteenth Amendment to the United States Constitution

Defendant cites *Slaughter-House Cases*, 16 Wall. 36 (1873), as authority for the proposition that the right to pursue a gainful employment unimpeded by arbitrary state interference is a liberty preserved under the due process clause of the Fourteenth Amendment to the United States

Constitution. Defendant goes on to argue that Chapter 267, Wis. Stats., deprives defendant of income earned without any demonstration that there is a need for such deprivation. Further, that persons of low income cannot post the bond in the amount of one and one-half times the sum in dispute and that, therefore, this remedy is illusory; that the deprivation of income is the most direct interference with the employment relationship, and that garnishment may cause an employee to be discharged by an employer.

Again, whether a creditor should be deprived of the provisional remedy in the case of a poor person is a matter for legislative determination. As matters now stand, the remedy does not exist until credit has been extended. If the remedy is drastic, it behooves the defendant to refrain from contracting debts beyond her ability to pay. Certainly this Court is without authority in law to override the legislative policy declared in Chapter 267, Wis. Stats. There is nothing arbitrary about establishing a provisional remedy in connection with the process of collecting a debt. Whether a need for that remedy exists is for the legislature to determine.

VI

Denial of Equal Protection of Law

Defendant argues that Chapter 267 deprives the defendant of equal protection of law in violation of the Fourteenth Amendment to the United States Constitution because it permits illegal discrimination between persons in similar circumstances. This argument is based upon the proposition that Sec. 267.22, Wis. Stats., permits garnishment of salaries and wages of public officers and employees after judgment only.

Memorandum Decision of Circuit Court

Chapter 267 does treat public employees different than members of the public at large as stated by the defendant. It has been held that this is a proper classification. 4 O.A.G. 783. The Court agrees with that opinion. The continuity of the public business may very well be the reason why garnishment may not lie against a public employee until after judgment. That reason may lend support to the defendant's previous argument concerning interference with her employment but it does not destroy the reason for the classification. The validity of differentiating between public and private employees effectively destroys defendant's argument in this respect.

CONCLUSION

The judgment of the County Court of Milwaukee County must be affirmed, and plaintiff's counsel will accordingly prepare an appropriate order for judgment, submit the same to counsel for the defendant for approval as to form, and thereafter offer the same for signing and entry.

Dated at Milwaukee, Wisconsin, this 15th day of March, 1967.

BY THE COURT:

/s/ GEORGE D. YOUNG
Circuit Judge

Opinion of Supreme Court of Wisconsin

And afterwards, to-wit on the 8th day of December, A.D. 1967, the same being the 61st day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

—v.—

CHRISTINE SNIADACH, ALIAS,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

Opinion by Chief Justice Currie

This cause came on to be heard on appeal from the judgment of the Circuit Court for Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court for Milwaukee County herein be, and the same is hereby affirmed. (Justices Heffernan and Wilkie dissent. Opinion filed.)

Opinion of Supreme Court of Wisconsin

No. 64

August Term, 1967

STATE OF WISCONSIN—IN SUPREME COURT

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

—v.—

CHRISTINE SNIADACH, ALIAS,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

APPEAL from an order of the circuit court for Milwaukee county: GEORGE D. YOUNG, Circuit Judge. *Affirmed.*

Plaintiff finance corporation instituted a garnishment action in the county court of Milwaukee county naming Christine Sniadach as defendant and Miller Harris Instrument Co. as garnishee. Both defendant and garnishee were served with copies of the verified garnishee complaint and the garnishee summons on November 21, 1966.

The garnishee complaint alleged that: a summons had been issued in an action by plaintiff finance corporation against defendant; judgment had not yet been entered; the action was one to recover damages upon a promissory note; and the amount of plaintiff's claim against defendant was $420 above all offsets. On November 30, 1966, the garnishee filed its answer in which it stated it had wages of $63.18 in its control belonging to defendant, and that it would

pay one half thereof to defendant as a subsistence allowance and hold the other half subject to the further order of the court.

On December 23, 1966, defendant served on plaintiff's counsel and filed an order requiring plaintiff to show cause why the garnishment proceedings should not be dismissed for violating defendant's rights under Art. I, Sec. 9 of the Wisconsin Constitution, and under the due process and equal protection clauses of the United States Constitution. A hearing was held on January 3, 1967, and on January 7, 1967, the county court, Thaddeus J. Pruss, Judge, presiding, entered its order upholding the constitutionality of Wisconsin's garnishment before judgment statutes, secs. 267.02 (1) (a) 1, 267.05 (1), and 267.07 (1), Stats.

Defendant then appealed from this order to the circuit court. On April 18, 1967, the circuit court affirmed the county court's order, and defendant has appealed from the circuit court's order.

CURRIE, C. J. Appellant attacks the constitutionality of Wisconsin's garnishment before judgment statutes, secs. 267.02 (1) (a) 1, 267.05 (1), 267.07 (1), 267.16 (1), 267.18 (2), and 267.21, Stats., on a number of grounds based on injustices and deprivations which have been, or are likely to be, suffered by others, but which she has not personally experienced.

One such ground is that poor wage earners may have their wages garnished in a situation where there is no merit to the claim for which the principal action has been instituted. As a result such wage earners either are forced to settle with the plaintiff by assigning future wages, or are deprived of their wages for a long period of time until the principal action can be tried and probable cause de-

(1) These statutes deprive appellant of her property without due process of law.

(2) Appellant is denied due process of law, because the statutes afford her no right to an immediate hearing to challenge the validity of the garnishment.

(3) The legislature has assumed judicial powers in violation of art. VII, sec. 2, Wis. Const.

(4) The garnishment before judgment statutes deny appellant equal protection of the laws because they subject wage earners to harsher summary process than other classes of debtors.

Deprivation of Property Without Due Process.

The garnishment before judgment proceedings do not involve any final determination of the title to a defendant's property, but merely preserve the status quo thereof pending determination of the principal action. The defendant receives notice and a hearing before being permanently deprived of his or her property.

In *McInnes* v. *McKay*[5] it was contended that Maine's statute, which permitted attachment, without affidavit or bond, in advance of judgment, deprived the defendant of due process of law contrary to the fourteenth amendment of the United States Constitution. The relevant statute provided:

"All civil actions, except scire facias and other special writs shall be commenced by original writs; which, in the Supreme Judicial Court, may be issued by the

[5] (1928), 127 Me. 110, 141 Atl. 699.

clerk in term time or vacation, and framed to attach the goods and estate of the defendant, and for want thereof to take the body, or as an original summons, without an order to attach goods and estate."[6]

The court held that this was

"... not a deprivation without 'due process of law' for it is part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal."[7]

It noted that the attachment merely created a temporary lien, which did not destroy the defendant's title. The court also cited the United States Supreme Court's statement in *Rothschild* v. *Knight*[8] that to what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide.

McInnes v. *McKay* was affirmed by the United States Supreme Court in a per curiam decision[9] on the authority of *Ownbey* v. *Morgan*[10] and *Coffin Brothers* v. *Bennett*.[11]

Ownbey v. *Morgan* upheld the constitutionality of Delaware's foreign attachment law as not being a denial of due process even though it harshly provided that before the defendant could appear and defend he had to give security in the amount of the value of the property attached. The court in its opinion declared:

"The due process clause does not impose upon the States a duty to establish ideal systems for the ad-

---

[6] Maine Rev. Stats. 1928, ch. 86, sec. 2.

[7] *Supra*, footnote 5, at p. 116.

[8] (1902), 184 U.S. 334, 341, 22 Sup. Ct. 391, 46 L.Ed. 573.

[9] (1928), 279 U.S. 820, 49 Sup. Ct. 344, 73 L.Ed. 975.

[10] (1921), 256 U.S. 94, 41 Sup. Ct. 433, 65 L.Ed. 837.

[11] (1928), 277 U.S. 29, 48 Sup. Ct. 422, 72 L.Ed. 768.

termined. Here, appellant's indebtedness is on a note, and her affidavit in support of the order to show cause contains no allegation that she is not indebted thereon to plaintiff.

Another alleged ground of unconstitutionality is that sec. 267.18 (2) (a), Stats.,[1] makes no accommodation for defendants with more than one dependent. However, appellant received the benefit of the maximum subsistence allowance of one half of the amount of her garnished wages, and her affidavit does not allege how many dependents, if any, she has.

Another alleged ground of unconstitutionality is that sec. 267.21, Stats., which permits a defendant to post a bond and secure the release of his garnished property, denies equal protection of the laws to persons of low income. Appellant has made no showing that she is a person of low income and unable to post a bond.

A further alleged ground of unconstitutionality is that the garnishment before judgment statutes threaten the gainful employment of many wage earners. It is claimed that many employers discharge garnished employees for being unreliable. Appellant, however, has made no showing that her own employer reacted in this manner.

---

[1] Sec. 267.18 (2) (a), Stats., provides: "When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50% of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action."

Still a further ground of attack is the provision in sec. 267.07 (1), Stats., which affords ten days' time to plaintiff to serve the garnishee summons and complaint on defendant after service of same on the garnishee. Here, appellant was served on the same day as the garnishee.

It is a long-accepted rule that a party may not urge the unconstitutionality of a statute upon a point not affecting his or her rights.[2] In *State ex rel. Kellogg* v. *Currens*[3] the challenging party presented 11 grounds of attack upon the constitutionality of a statute. The court discussed the one which affected the challenger but refused to discuss the other ten, stating:

> "... Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions ... We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others. ..."[4]

Accordingly we will confine our consideration of appellant's grounds of attack upon the garnishment before judgment statutes to those directly affecting her. The grounds of attack which will thus be considered are:

---

[2] *Scharping* v. *Johnson* (1966), 32 Wis.2d 383, 395, 145 N.W.2d 691; *Joint School Dist.* v. *Boyd* (1955), 270 Wis. 222, 226, 70 N.W.2d 630; *Milwaukee Boston Store Co.* v. *Amer. Fed. of H. W.* (1955), 269 Wis. 338, 357, 69 N.W.2d 762; *Anderson* v. *State* (1936), 221 Wis. 78, 89, 265 N.W. 210; *State ex rel. Kellogg* v. *Currens* (1901), 111 Wis. 431, 87 N.W. 561; 16 C.J.S., *Constitutional Law*, p. 226, sec. 76(a).

[3] *Supra*, footnote 2.

[4] *Id.* at pp. 442-443.

ministration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. . . ." [12]

Coffin Brothers v. *Bennett* involved a Georgia statute which authorized the superintendent of banks to issue an execution against the property of a stockholder of a defunct bank upon whom a stock assessment had been levied. Mr. Justice Holmes wrote the unanimous opinion for the court and stated:

"The objection urged by the plaintiffs in error seems to be that this section purports to authorize an execution and the creation of a lien at the beginning, before and without any judicial proceeding. But the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors.' A reasonable opportunity to be heard and to present the defence is given and if a defence is presented the execution is the result of a trial in Court. The Fourteenth Amendment is not concerned with the form. *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40, 42. The fact that the execution is issued in the first instance by an agent of the State but not from a Court,

[12] *Supra*, footnote 10, at pp. 110-111.

followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection. . . ." [13]

While neither *Ownbey* v. *Morgan* nor *Coffin Brothers* v. *Bennett* involved garnishment before judgment statutes, their rationale, when cited by the United States Supreme Court as authority for affirming *McInnes* v. *McKay* becomes clear. It is that the creditor's remedies involved, though harsh, did not deprive a man of his property without notice and an opportunity to be heard.

The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times.[14] In regard to the constitutional relevance of antiquity, Mr. Justice Holmes has stated:

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey* v. *Morgan*, 256 U. S. 94, 104, 112." [15]

---

[13] *Supra*, footnote 11, at p. 31.

[14] 1 Wade on Attachment (1886), pp. 19-22, sec. 1.

[15] *Jackman* v. *Rosenbaum Co:* (1922), 260 U.S. 22, 31, 43 Sup. Ct. 9, 67 L.Ed. 107. See also *Frank* v. *Maryland* (1959), 359 U.S. 360, 370, 79 Sup. Ct. 804, 3 L.Ed.2d 877, in which Mr. Justice Frankfurter cites *Jackman* and *Ownbey* as to the legal significance of a long and consistent history of state practice.

We deem a West Virginia decision, which dealt with a before judgment garnishment, to be apposite. In *Byrd* v. *Rector*[16] the nonresident defendant, who had been garnished before judgment, argued that he had been denied due process because the plaintiff had not been required to post a bond before the garnishment. The court stated:

> "We think the answer to these propositions is that a defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment *in personam* or *in rem* on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process. In the meantime there has been no deprivation of property. The attachment, *quasi rem* in nature, has operated only to detain the property temporarily, to await final judgment on the merit's [sic] of plaintiff's claim. No constitutional right is impaired. *McInnes* v. *McKay*, (Me.) 141 Atl. 699. Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp. Under no circumstances could it be converted into cash and applied on the plaintiff's demand prior to final adjudication

[16] (1932), 112 W. Va. 192, 163 S.E. 845.

of the merits of the controversy between plaintiff and defendant. Now, if pending such determination, the defendant is inconvenienced because he is temporarily deprived of the possession and use of his property in the hands of the garnishee, the defendant may acquire possession by giving bond, for which provision is made by Official Code, 38-7-20. We find no error under this point." [17]

In view of the aforecited authorities, we determine that Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law.

Failure of Garnishment Statutes to Afford Appellant an Immediate Hearing

Sec. 267.16 (1), Stats., provides:

> "No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs."

Appellant contends that the failure of the garnishment statutes to afford her an immediate hearing on the propriety of the garnishment constitutes a denial of due process.

However, despite the fact that the garnishment statutes do not grant to appellant the right of judicial review of the propriety of the garnishment action prior to trial of the principal action, Wisconsin case law establishes that she can obtain such judicial review.

---

[17] *Id.* at p. 198. *See also* 16 Am. Jur. 2d, *Constitutional Law*, p. 980, sec. 576.

In *Orton* v. *Noonan*[18] the court stated in regard to garnishment before judgment:

> ". . . the court, without the aid of any express statutory provision, has a general power to control and regulate the proceeding upon summary process of this nature, so as to correct or prevent any abuse or misuse of such process, and that the defendant may, in some proper form, contest the truth of the grounds alleged by the plaintiff for obtaining it." [19]

Thus the court's power to control its process is inherent and requires no statutory authorization.

This court in *Chernin* v. *International Oil Co.*[20] reaffirmed the right of a defendant to move to quash or dismiss the garnishment action to the point of a judicial ascertainment that a good-faith controversy exists. The procedure approved therein was a motion for summary judgment dismissing the garnishment action on the ground that the complaint in the principal action failed to state a cause of action "for damages founded upon contract" as required by then sec. 267.01 (3), Stats. Such requirement is now to be found in present sec. 267.02 (a).

Thus potential abuses of garnishment before judgment are subject to judicial review before trial of the principal action. Moreover, a garnishment without probable cause can be the basis of a suit for malicious prosecution.[21] We, therefore, find no denial of due process in the failure of the garnishment statutes to contain a provision for judicial review of the propriety of a garnishment action prior

---

[18] (1871), 27 Wis. 572.

[19] *Id.* at p. 579.

[20] (1952), 261 Wis. 308, 52 N.W.2d 785.

[21] *Novick* v. *Becker* (1958), 4 Wis. 2d 432, 90 N.W.2d 620.

to trial of the principal action, inasmuch as such right exists independently of statute.

Assumption of Judicial Powers

Sec. 267.04, Stats., provides in part as follows:

"(1) Upon payment to the clerk of court of a clerk's fee of $2 and a suit tax of $1, the clerk shall issue a garnishee summons . . . .

"(2) The garnishee summons shall be substantially in the following form:

". . .

"YOU ARE ORDERED TO RETAIN SUCH PROPERTY [belonging to the defendant] AND MAKE NO PAYMENT, EXCEPT FOR SUBSISTENCE ALLOWANCE IF ANY, TO THE PRINCIPAL DEFENDANT PENDING THE FURTHER ORDER OF THE COURT.

". . .

"(3) A garnishment action shall be commenced by the service of a garnishee summons and annexed verified complaint."

In regard to the complaint, sec. 267.05 (1), Stats., provides:

"The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in s. 267.02 (1) (a), the amount of the plaintiff's claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property

is, to the best of plaintiff's knowledge and belief, not exempt from execution."

The plaintiff must file with or mail to the clerk of court a copy of both the garnishee summons and complaint before serving the garnishee-defendant.[22] We deem a more accurate statement of appellant's position to be that the legislature has attempted to unconstitutionally vest judicial powers in an administrative officer.

This court in 1927 in *State* v. *Van Brocklin*[23] upheld the constitutionality of a state statute which conferred power on a clerk of court to issue a search warrant upon determining probable cause against the contention that this violated art. VII, sec. 2, Wis. Const. The court quoted with approval from the Alabama case of *Kreulhaus* v. *Birmingham*[24] as follows:

"'. . . it was not the intention of the framers of the Constitution to deny to the Legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary, properly so called, many duties involving inquiries in their nature judicial.'"[25]

While some members of this court question some of the reasoning employed by the court to reach the result in *State* v. *Van Brocklin*, we approve of the holding that some duties involving inquiries judicial in their nature may be delegated to administrative officers where the acts of such officers are later subject to judicial review.

---

[22] Sec. 267.10, Stats.

[23] (1927), 194 Wis. 441, 217 N.W. 277.

[24] (1909), 164 Ala. 623, 51 So. 297.

[25] *Id.* at p. 629.

In *Central Loan & Trust Co.* v. *Campbell*[26] the United States Supreme Court considered the argument that a territorial statute of Oklahoma was void, because it allowed a probate judge to issue a writ of attachment, while the organic act of the territory vested all common law jurisdiction in the Supreme Court and District Courts of Oklahoma. The court rejected this argument, and stated:

> "On the face of the Oklahoma statute it is apparent that it is required as a prerequisite to the issuance of an attachment that the affidavit, in support thereof, shall simply state the particular ground for attachment mentioned in the act, and therefore that the granting of an order for attachment does not involve the discharge of a judicial function, but merely the performance of a ministerial duty, that is, the comparison of the language of the affidavit with the terms of the statute . . . It is elementary that where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court." [27]

As appears from the prior quotation herein from *Coffin Brothers* v. *Bennett*,[28] the United States Supreme Court also found unobjectionable the fact that the execution had been issued by the state superintendent of banks instead of a court. However, the court was there concerned with the due process clause of the fourteenth amendment rather

---

[26] (1899), 173 U.S. 84, 19 Sup. Ct. 346, 43 L.Ed. 623.

[27] *Id.* at pp. 95-96.

[28] *Supra*, footnote 11.

than the issue of unconstitutional delegation of judicial power contrary to a state constitution.

We find no merit to appellant's contention that sec. 267.04, Stats., violates art. VII, sec. 2, Wis. Const.

Denial of Equal Protection of the Laws

Appellant's brief asserts that the garnishment before judgment statutes subject wage earners to harsher summary process than other classes of debtors. However, any debtor, wage earner or not, is subject to these statutes. For example, bank accounts of businessmen and corporations are subject to garnishment before judgment. It may be argued generally that the effect of garnishment before judgment is harsher on wage earners than other classes of debtors. However, appellant has not set forth how these statutes, as applied to her own particular situation, have denied her equal protection of the laws. We decline to consider this argument of denial of equal protection in the absence of facts substantiating such contention.

Pending Legislation

This court is fully cognizant of the fact that many undue hardships have resulted from the operation of Wisconsin's before judgment garnishment statutes in the cases where wages and salaries of employees have been garnished. We are pleased that there is pending before the present legislature legislation that will remedy these abuses.

On November 14, 1967, the assembly passed by a vote of 89 to 5 Substitute Amendment 1, to Bill No. 454, which bars garnishment before judgment of the wages or salary of the principal defendant. The State Senate now has this measure before it.

By the Court.—Order affirmed.

Dissenting Opinion of Supreme Court of Wisconsin

(Filed December 8, 1967)

STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1967

No. 64

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

—v.—

CHRISTINE SNIADACH, alias,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

HEFFERNAN, J. (dissenting) The majority opinion would lead one to believe that garnishment before judgment is a venerable practice of Anglo-Saxon jurisprudence and should be accorded the imprimatur of time. Yet, the fact of the matter is that this is a rather new development in Wisconsin law. The excellent brochure written by Paul L. Moskowitz for the Wisconsin Extension Law Department states:

"Chapter 267 of the Wisconsin Statutes (1959) comes from R.S. 1878, Section 275[illegible] statute in Wisconsin originally provided garnishment as a rem-

edy in aid of execution only. Many states still follow this law." 1962 Wisconsin Lawyers' Seminars, Wisconsin Garnishment and Exemptions, p. 1.

Garnishment is strictly a statutory remedy. *Markman* v. *Becker* (1959), 6 Wis. 2d 438, 95 N.W. 2d 238. Thus, it is apparent that it is no great sacred bastion of the common law that is under assault in this case. The only question is whether legislative action has deprived the defendant and others similarly situated of their constitutional rights.

The majority concludes that the garnishment statute does not result in a deprivation of property. The rationale behind this is embodied in the majority's quotation from *Byrd* v. *Rector* (1932), 112 W. Va. 192, 163 S.E. 845. The essence of that quotation is that there is no deprivation of the defendant's property because the procedure places the defendant's property in the hands of the law and not in the hands of the plaintiff until after judgment.

It strikes me that this reasoning is most unrealistic. The constitutional question is not whether defendant has lost his title to the property, nor whether another has gained its beneficial use. The test is whether *he* was deprived of his property. In the instant case no legal fiction can disguise the fact that, from the time of the service of the garnishee summons until the lien of that process is released, the defendant is unable to make any beneficial use of his wages other than the pittance which may be available to him either as an exemption or subsistence allowance. Moreover, the case of *Byrd* v. *Rector* is only of strained applicability in the present case. In that case an infant plaintiff, who had been injured by the explosion of a dynamite cap which had been negligently disposed of by a nonresident defendant, commenced a suit in tort

for his personal injury. Accordingly, an *attachment* was issued on the ground that the defendant was a nonresident. The *Byrd Case* furnishes a sound rationale in support of our attachment laws, and were the plaintiff's attack on the attachment procedures, ch. 266 of the Wisconsin statutes, the citation would be more appropriate. Chapter 266 recognizes that attachment is an unusual remedy—to be resorted to only in special circumstances. It is designed to protect state residents from creditors whose conduct amounts to fraud or from foreign creditors who have assets within the state. The *Byrd Case* situation is clearly contemplated by sec. 266.03(2)(a):

> "(2) Tort Action. In tort actions the affidavit shall state that a cause of action in tort exists in favor of the plaintiff and against the defendant, that the damages sustained exceed fifty dollars specifying the amount claimed and either:
>
> "(a) That the defendant is not a resident of this state. . . ."

The case of *Ownbey v. Morgan* (1921), 256 U.S. 94, 109, 41 Sup. Ct. 433, 65 L. Ed. 837, points out that the attachment of the goods of a foreigner is to be treated uniquely and is dependent in part on the duty of a state to protect its own citizens in their claims against nonresident owners of property situate within the state. The *Ownbey Case* uses a rather quaint, archaic, and unacceptable rationale in concluding that there is no denial of due process when a debtor's property is detained, stating:

> "[A] man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition; and it cannot be

deemed so arbitrary as to render the procedure inconsistent with due process of law. . . ." P. 111.

This same case stressed the origins of the attachment procedure and pointed out that its purpose was to distrain the defendant's property to assure the appearance of the defendant so that there could be a procedure in personam against him. It is clear that *Ownbey* v. *Morgan* has little relevance to the Wisconsin law which permits the garnishment of wages of Wisconsin residents.

While *McKay* v. *McInnes* (1928), 279 U.S. 820, 49 Sup. Ct. 344, 73 L. Ed. 975, is relied upon by the majority, it appears that the United States Supreme Court without opinion merely affirmed the Maine court on the basis of *Ownbey* v. *Morgan, supra,* and *Coffin Brothers* v. *Bennett* (1928), 277 U.S. 29, 48 Sup. Ct. 422, 72 L. Ed. 768. As pointed out above, *Ownbey* is not applicable to this case. The *Coffin Brothers* opinion is a rather cursory one by Mr. Justice Holmes in which he justifies his conclusion on the basis that it is a "familiar method in Georgia." This is hardly a persuasive rationale; and as pointed out above, it is specious reasoning to conclude that, because a debtor has a chance to be heard on the question of whether or not his property should be returned to him, he has not been deprived of his property in the interim. Moreover, Mr. Justice Holmes points out that the defendants "are allowed to raise and try *every possible* defense by an affidavit of illegality." (Emphasis supplied.) The Wisconsin statute provides for no such comprehensive mode of defense available at the inception of the suit.

While some of the reasoning in these cases is appropriate to the garnishment of property, it has little or no relevance to the garnishment of wages. The garnishment

of wages is uniquely a product of the accrual bookkeeping system which has only come to fruition in the twentieth century. Until recently, laborers were paid by the day and not by the week or month. Hence, the law of garnishment in terms of historical precedent arose out of the garnishment of property other than wages. There is little pertinence in the majority's statement that the right to place a lien upon a man's property dates back to medieval England and Roman times. Accrued wages, in terms of the history of the law, are a new property right and should be treated by the law with that distinction in mind.

It should also be noted that until recently wages were totally exempt from garnishment. Rood on Garnishment (West's, 1896), sec. 87, page 119, states the policy of the wage exemptions that was nearly universal until near the end of the nineteenth century:

> "The policy of the law—the intent of the legislature in enacting these provisions—is too plain for argument. It was to secure to those who toil with their hands, or depend for their subsistence upon their personal earnings, a sufficient amount of the fruits of their labor to supply them and their families with the necessities of life and a few of the conveniences of modern civilization, free from the merciless grasp of their less needy creditors."

It was not until the enactment of ch. 141 of the Laws of Wisconsin (1883) that the exemption for wages was in part abandoned.[1]

[1] An earlier enactment, ch. 317, Laws of Wisconsin (1882), provided for an exemption of all wages for three months prior to the garnishment.

I would concede that it is not unconstitutional to deprive a defendant of his property, including wages, by garnishment and to hold it in *custodia legis* for a limited period of time so that the creditor can be certain that the assets are there to satisfy its judgment when once obtained. Under the Wisconsin statutes, however, the plaintiff need not serve his summons on the defendant until ten days after he has served the garnishee. This is a clear denial of due process, for the wages of the defendant are distrained without the necessity of notice to their equitable owner. As the majority opinion clearly points out, however, there is no allegation that this particular denial of justice took place in the instant case. It should be noted, however, that the very case relied upon by the court, *Ownbey* v. *Morgan, supra,* page 103, states that, in determining whether there is a denial of due process, the court is not confined to the particular case at hand but is to make its determination ". . . with respect to the general effect and operation of the system of procedure established by the statutes." While *Ownbey* takes the position that the unusual case of hardship should be overlooked in favor of the general statutory scheme, it is obvious that the converse reasoning is equally applicable.

The defendant complains, however, that even though the notice is given simultaneously, *i.e.,* by a concurrent service on both the principal defendant and the garnishee, nevertheless, the property is withheld unconscionably until there has been a trial of the principal action. The majority dismisses this contention by stating that it is in the inherent power of a court to prevent any abuse or misuse of the process and that the defendant may, as said in *Orton* v. *Noonan, infra,* "in some proper form" contest the truth of the grounds alleged by the plaintiff.

This court has defined that right to contest the plaintiff's use of process in *Chernin* v. *International Oil Co.* (1952), 261 Wis. 308, 52 N.W. 2d 785, and it is apparent that the defendant's rights are in fact limited to the determination of whether a good faith controversy exists. *Orton* v. *Noonan* (1871), 27 Wis. 572, quoted by the majority, makes it clear that all the plaintiff has to do to satisfy this requirement is the making and filing of an affidavit of indebtedness to the plaintiff. And *Chernin* v. *International Oil Co.* merely determined that where the complaint in the principal action alleges a cause of action for damages for breach of contract the garnishment action will not be dismissed.

Under the state of law as it now stands, unless the plaintiff's complaint is demurrable or on its face fraudulent there is no relief available to the defendant short of the trial of the principal action. There is no statutory or common law procedure whereby the defendant can in a timely or summary fashion "raise . . . every possible defense by an affidavit of illegality," as described in *Coffin Brothers* v. *Bennett, supra.* The right to a prompt and summary defense on the merits that Mr. Justice Holmes found as a saving grace in *Coffin* is fatally absent in the instant case.

Nor do I consider the possibility of a malicious prosecution action to be much solace to a wage owner who has been oppressed by an improper garnishment procedure action. If he has the resources to commence a retaliatory action for damages, he most likely would have been able to successfully defend himself in a garnishment action. The majority reasoning is similar to that of *Ownbey* where the United States Supreme Court concluded that the defendant's property would not have been seized if he were

not a man of property and, hence, he should be able to take care of himself. The circuity of the court's reasoning is not acceptable to me.

I conclude that a major constitutional defect of the statute is its failure to provide for a mandatory trial on the merits within a limited and statutorily defined time following the seizure of the defendant's wages.

I am in agreement with the majority's point that the issuance of a garnishee summons by the clerk of court does not constitute the usurpation of judicial power. I am, however, in complete disagreement with the rationale by which it arrives at that conclusion. Its conclusion is supported by the reliance on two discredited cases. The first of these is *State v. Van Brocklin* (1927), 194 Wis. 441, 217 N.W. 277. In this case the question was whether a statute which permitted the clerk of the Winnebago county court to issue a search warrant constituted the proper exercise of judicial power. The court in *Van Brocklin* found an implied authorization for such delegation of power in sec. 23, art. VII, of the Constitution, which manifestly was designed to provide for the appointment of court commissioners exercising the power of a judge in chambers. The court concluded that if the legislature had that power it undoubtedly had the residual power to authorize clerks of municipal courts to issue criminal warrants. It is submitted that this hardly follows. At any rate this court has subsequently, in *White* v. *Simpson* (1965), 28 Wis. 2d 590, 137 N.W. 2d 391, clearly ruled that only a magistrate exercising judicial power is authorized to issue a warrant, making it clear that the question of probable cause is not to be left to an administrative officer. *Giordenello* v. *United States* (1958), 357 U.S. 480, 486, 78 Sup. Ct. 1245, 2 L. Ed. 2d 1503, used the language, "The Commissioner must *judge*

for himself the . . . facts . . . . to show probable cause." (Emphasis supplied.) The other case relied upon by the majority, *Kreulhaus* v. *Birmingham* (1909), 164 Ala. 623, 51 So. 297, held that the statute that permitted a clerk to issue warrants of arrest did not confer any judicial power. The rationale of the Alabama court was:

> "The statute in this case conferred no power upon the clerk to finally hear and determine, nor even to commit to bail, but only to issue warrants, which must be construed to authorize him to issue warrants on probable cause. . . ." Pp. 629-630.

It is obvious that following the *White* v. *Simpson* rationale, this case is equally repugnant to our now accepted standards of due process.

I agree with the court's rationale that the only determination required of the clerk is a ministerial one, that is, it is only necessary for the plaintiff to set forth in the language of the statute the basis upon which the summons is requested. This is not a determination of probable cause. It is not a judicial function and is not constitutionally prohibited. I object, however, to the majority's failure to rest their position upon this perfectly good argument. Instead they have chosen to shore up this rationale with outworn precedents of extremely dubious authority, and by so doing have put the ruling of *White* v. *Simpson* in jeopardy.

In view of my views set forth above, I must respectfully dissent from the court's opinion. I am convinced that the plaintiff has established that she is personally aggrieved to the extent that she may properly raise at least some of the constitutional issues which she presses. Since I find her complaint has validity as set forth above, I would

hold the garnishment statute unconstitutional in that it deprives the defendant of property—wages—without due process of law—in that she lacks any method of insuring a reasonably prompt adjudication of her rights and the return of her property. I also dissent because the majority opinion has failed to state adequately what I conceive to be its true position—that the affirmance of the trial court results not from a conviction that the trial court is correct on the constitutional question, but rather on the fact that this particular plaintiff has not been aggrieved. The court was no doubt influenced by the legislative progress of the bill that would end the garnishment of wages prior to judgment. There is an understandable willingness to "let sleeping dogs lie" when there exists the strong possibility that the legislature will shortly correct this harsh and unconstitutional legislation. I believe, however, that this court would be remiss in its constitutional duties if it did not hold a statute unconstitutional if in fact it appears to be so, even though the legislature is about to fashion a correction. Since I believe the statute to be in part unconstitutional, I would reverse.

I am authorized to state that Mr. Justice Wilkie joins me in this dissent.

Motion for Rehearing Denied

And afterwards, to-wit on the 27th day of February, A. D. 1968, the same being the 97th day of the August, 1967 Term, the following proceedings were had in said cause in this Court:

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

—v.—

CHRISTINE SNIADACH, alias,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in said cause, it is now here ordered that said motion be, and the same is hereby, denied with costs.

APPENDIX B

Statutory Provisions Involved

This case involves the following statutes of the State of Wisconsin:

(a) Wis. Stat. §267.01 (1967 Pocket Part)

(1) Any creditor may proceed against any person who is indebted to or has any property in his possession or under his control belonging to such creditor's debtor, as prescribed in this chapter. "Plaintiff" as used in this chapter includes a judgment creditor and "defendant", a judgment debtor.

(2) Except as otherwise provided in this chapter, the procedure in garnishment actions shall be the same as in ordinary civil actions.

(2a) A garnishment action is a separate action.

(3) An individual may commence a garnishment action in his own person and in his own behalf, or by an attorney licensed to practice in the courts of this state, but not otherwise. Garnishment actions on behalf of any other party shall be commenced only by attorneys licensed to practice in the courts of this state.

(4) No garnishment action shall be brought to recover the price or value of spirituous, malt, ardent or intoxicating liquors sold at retail.

(b) Wis. Stat. §267.02 (1967 Pocket Part)

(1) A plaintiff may commence a garnishment action at any time after:

(a) A summons is issued: 1. In an action for damages founded upon contract, express or implied (or in a contract action where a writ of attachment could issue on demands not yet due under s. 266.03(3)). 2. In an action upon a judgment. 3. In a tort action where a writ of attachment could issue under s. 266.03(2).

(b) An execution upon an in personam judgment is issuable.

(2) If wages or salary are the subject of a garnishment action, and payment of wages or salary to the defendant is, has been, or should be, withheld therein, plaintiff may not commence any other garnishment action affecting the wages or salary of the principal defendant prior to judgment in the principal action.

(3) Except as provided in sub. (2), the plaintiff may, in like manner, subsequently proceed against other garnishees, or, if he has reason to believe they have subsequently become liable, against the same garnishee.

(c) Wis. Stat. §267.05 (1967 Pocket Part)

(1) The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in s. 267.02(1)(a), the amount of the plaintiff's claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property

is, to the best of plaintiff's knowledge and belief, not exempt from execution.

(d) Wis. Stat. §267.07 (1967 Pocket Part)

(1) Except as provided in s. 267.05(4), the garnishee summons and complaint shall be served on the garnishee as required for the exercise of personal jurisdiction under ch. 262, and notice of such service in substantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal defendant as required for the exercise of personal jurisdiction under ch. 262, not later than 10 days after service on the garnishee as provided in s. 262.06.

(e) Wis. Stat. §267.13 (1967 Pocket Part)

(1) If the answer shows a debt due to the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, as stated in the garnishee complaint, with interest and costs, to the clerk of the court. If prior to so doing, the plaintiff in writing requests the garnishee to pay such sum to such clerk, the garnishee shall, within 5 days after receipt of such request, pay the sum to the clerk. The clerk shall give his receipt therefor to the garnishee. Such payment shall discharge the garnishee of all liability for the amount so paid.

(2) If the debt disclosed is not due, this section shall apply when it becomes due, with like effect.

(3) If the garnishee fails to pay such sum within 5 days after receipt of such request, the plaintiff shall

be entitled to judgment against the garnishee for the amount disclosed, when due, either before or after judgment in the original action and may collect the same by execution; but in case no judgment has been rendered in the principal action the execution against the garnishee shall require the sheriff to pay the money collected into court to abide the event of the principal action. Moneys paid into court shall be paid to the plaintiff when final judgment is rendered in his favor, and to the extent of satisfying the same, upon order of the court, and any balance to the party entitled thereto.

(4) If no such request is made and the garnishee does not elect to pay such sum to the clerk, the garnishee shall hold the same until order of the court. No stipulation between the plaintiff and the defendant shall be honored by the garnishee, until signed and approved by the court.

(5) If judgment is against the plaintiff such moneys shall be paid to the defendant.

(f) Wis. Stat. §267.16 (1967 Pocket Part)

(1) No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs.

(2) The court may adjudge the recovery of any debt, the conveyance, transfer or delivery to the sheriff or any officer appointed by the judgment of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand; or by the judgment pass the title thereto; and

may therein or by its order direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid or delivered to the clerk or officer. The judgment against a garnishee shall discharge him from all demands by the defendant for all property paid, delivered or accounted for by the garnishee, by force of such judgment.

(g) Wis. Stat. §267.18 (1967 Pocket Part)

(1) From the time of the service of the summons and complaint upon the garnishee he shall stand liable to the plaintiff for the property then in his possession or under his control belonging to the defendant or in which he is interested to the extent of his right or interest therein and for all his debts due or to become due to the defendant, except such as are exempt from execution, but not in excess of the amount of the plaintiff's claims as disclosed by his garnishee complaint together with 25 per cent of the amount claimed in the garnishee complaint but not less than $25 nor more than $500 to secure costs.

(2) (a) When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

(b) If the court determines that the principal defendant is entitled to an exemption in excess of the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be set off and applied against said exemption. If the court determines that the principal defendant is entitled to an exemption less than the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be the exemption to which the principal defendant is entitled in such garnishment action.

(h) Wis. Stat. 267.20 (1967 Pocket Part)

Except upon the order of a judge no action shall be commenced by the defendant or his assignee against a garnishee upon any garnished claim or demand or to recover any property garnished, or execution be issued upon a judgment in favor of defendant against such garnishee, until the termination of the garnishment; and if an action has been commenced or an execution issued it shall be stayed by the court or a judge thereof as to the garnishee upon his application.



LIBRARY
SUPREME COURT, U. S.

FILED
JAN 31 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968 No. 130

CHRISTINE SNIADACH,

Petitioner,

-v-

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY.

RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

SHELDON D. FRANK
135 West Wells Street
Milwaukee, Wisconsin 53203

SIDNEY GRAY
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Of Counsel

Attorneys for Respondent

INDEX

	Page
CITATION TO DECISIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT	3
HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW	3
REASONS FOR DENYING THE WRIT:	
I	5
II	7
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:

Boynton Cab Co. v. Giese, 237 Wis. 237, 296 N. W. 630 (1941)	9
Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845 (1932)	4, 11

Page

Coffin Bros. & Co. v. Bennett,
277 US 29, 72 L. Ed. 768,
48 S. Ct. 422 (1927)..... 5

Eagleson v. Rubin (S. C., Ida., 1909),
100P 765..... 10

Grannis v. Ordean,
34 S. C. 779..... 10

Henderson v. Mutual Fertilizer Company,
(S. C., Ga., 1920) 104 S. E. 229..... 9

Manufacturer's Freight Forwarding Co.,
294 Mich. 57, 292 N. W. 678, 680 (1940).. 5

McInnes v. McKay,
141 A. 699 (1928)..... 11

Phillips v. Commissioner of Internal
Revenue, 283 US 589, 51 S. Ct. 608,
75 L. Ed. 1289 (1930)..... 8

Pierce v. Chicago & Northwestern Railway
Co., 36 Wis. 283, 287..... 9

Scholberg v. Itnyre,
264 Wis. 211, 58 N. W. 2d 648 (1952)..... 5

Skalecki v. Frederick
31 Wis. 2d 496, 502 (1966)..... 6

Standard Oil v. Superior Court of New
Castle County, 44 Del. 538, 69 S. Ct. 738.. 6

Page

United States v. Department of Corrections of State of Delaware - 268 F.S. 242 (1967)..... 12

Statutes:

Wis. Stats., Sections 267.01, 267.02, 267.05, 267.07, 267.13, 267.16, 267.18, 267.20 (1967 Pocket Part.)..... 3

Wis. Stats., Sections 267.01, et seq..... 3

Wis. Stats., 1965, 267.07..... 7

Wis. Stats., 1965, 267.15 - 267.16..... 8

Legal Encyclopedias:

16A C.J.S. Constitutional Law, Section 619, page 808..... 7

16 Am. Jur. 2d Constitutional Law, Section 576, page 980..... 8

16 Am. Jur. 2d, supra, page 981..... 9

16A C.J.S. Constitutional Law, Section 613, page 762..... 10

6 Am. Jur. 2d Attachment & Garnishment, Section 5, page 563..... 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968 No. 130

CHRISTINE SNIADACH,

Petitioner,

-v-

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY.

RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Respondent prays that the petition for a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled case on December 8, 1967, rehearing of which was denied February 27, 1968, be denied.

CITATION TO DECISIONS BELOW

The order of the Milwaukee County Court of Wisconsin (R. 118-120) is unreported and is set forth in the appendix, infra, p. 3b. The memorandum decision of the Milwaukee Circuit Court of Wisconsin (R. 101-110) is unreported and is set forth in the appendix, infra, p. 8b. The

decision of the Supreme Court of Wisconsin (R. 126-148) is reported at 37 Wis. 2d 163, 154 N. W. 2d 259 (1967), and is set forth in the appendix, infra, p. 176.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on December 8, 1967 (R. 126). Rehearing was denied on February 27, 1968 (R. 150).

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1257(3), petitioner having asserted below, and asserting here, deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Petitioner is a $65.00 per week wage earner. Half the wages due her were garnisheed before trial by plaintiff in a lawsuit against her. Under Wisconsin law, before petitioner's wages were garnisheed, she had no right to notice and hearing other procedure for challenging the legality of the garnishment sought by plaintiff. The plaintiff did not have to show that without garnishment, he would be unlikely to obtain jurisdiction over petitioner or to collect a money judgment, nor did he have to show probable cause to believe that petitioner owed him any money, nor any other reason purporting to justify denial of notice and hearing. Does this procedure deny due process of law secured by the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Wis. Stats. Sections 267.01, 267.02, 267.05, 267.07, 267.13, 267.16, 267.18, 267.20 (1967 Pocket Part.). They are set forth in the appendix infra, p. 20b.

STATEMENT

Petitioner Christine Sniadach is a wage earner and resident of Milwaukee, Wisconsin. Family Finance Corporation of Bay View (respondent here) is engaged in the finance and loan business. Petitioner on September 2, 1964 borrowed the sum of $1,800.00 from the respondent and as of the date of the institution of the original action, November 16, 1966, a balance of $1,500.00 was still due and owing. The garnishment commenced under Wisconsin garnishment law, Wis. Stats. Sections 267.01 et seq., was for back payments only not for the entire balance. Garnishee answer revealed that $31.59 was due and owing. The claim of the principal action for $420.00 has been stayed pending the outcome of this proceeding involving the Wisconsin garnishment law.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner sought by order to show cause in the County Court to dismiss the garnishment on the ground that the Wisconsin procedure for

pre-judgment garnishment deprived her of due process of law under the Fourteenth Amendment to the Federal Constitution. Hearing was pending and on January 7, 1967, Judge Thaddeus Pruss of the County Court held that "the garnishment action in the instant proceedings does not violate defendant's constitutional rights under . . . the United States Constitution 14th Amendment due process and equal protection" (R. 119).

On appeal to the Circuit Court of Milwaukee, petitioner argued that the garnishment statute "deprives the defendant of due process of law in violation of the Fourteenth Amendment to the United States Constitution because the defendant is given no hearing before being deprived of his property." The Circuit Court affirmed on March 15, 1967, stating that "defendant's argument rejects the fact that nothing has happened to the defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff" (R. 105).

In the Supreme Court of Wisconsin argument was had between the petitioner and respondent and subsequently the same question of due process and equal protection was brought up and on December 8, 1967, the Supreme Court of Wisconsin affirmed the decision below holding that "Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law" (R. 134). The Court quoted with approval the language of Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845 (1932):

> (A) Defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted

to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon . . . Until (a final) judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp . . . (R. 134).

Two Justices of the Wisconsin Supreme Court dissented, their contention being "the test is whether he was deprived of his property" (R. 141).

REASONS FOR DENYING THE WRIT

I.

Garnishment procedure is essentially an issue of the Legislature and not of the Judiciary. In common law the remedy of garnishment was not known and as in our laws remedy is a creature of the Legislature. There is a clear distinction between legislative and Judicial acts. The Legislature makes the law; the courts apply it, In re Manufacturer's Freight Forwarding Co., 294 Mich. 57, 292 N.W. 678, 680 (1940), and also Scholberg vs. Itnyre, 264 Wis. 211, 58 N.W. 2d 648 (1952).

The before judgment garnishment statutes are a creature of the Legislature and a new right given to the creditor to pursue his remedy.

In Coffin Bros. & Co. v. Bennett, 277 US 29, 72 L. Ed. 768, 48 S. Ct. 422 (1927) at page 769, Justice Holmes states:

"...nothing is more common than to allow parties alleging themselves to be creditors to establish by attachment a lien dependent upon the result of the suit."

Skalecki v. Frederick, 31 Wis. 2d 496, 502 (1966) recognized the right of the Legislature to create such a remedy when it states:

"The general rule is that in absence of statutory authorization garnishment will not lie since it was unknown to the common law and it is completely statutory."

This was further set forth in Standard Oil v. Superior Court of New Castle County, 44 Del. 538, 69 S. Ct. 738 holds:

"A state may by appropriate legislation authorize attachment or garnishment of property within its borders subject to the limitations of the federal and state constitutions."

Respondent contends that the court is acting outside its function when it takes to changing a creature of the Legislature by judicial process, in fact, the State of Wisconsin by legislative action instituted a new garnishment law and procedure so that within a short time the law, as presently on the books, will be radically changed. This in itself is a clear indication that the Legislature saw the need for a change and took such action as was necessary to effect the change.

II.

Employees, or garnishee defendants are not deprived of their rights under the Due Process Clause.

Wisconsin Statutes 1965, 267.07 says in part:

> "...notice of such service (service on the garnishee) in substantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal-defendant as required for the exercise of personal jurisdiction under Ch. 262 not later than 10 days after the service on the garnishee as provided in s. 262.06."

The Petitioner must agree that under the above statute notice is given the principal-defendant as required by due process. The Petitioner argued that she had no notice until after the property was seized. The answer to this is that no one finds out anything until after it happens. The Appellant argued that she should be notified prior to the notice being served upon the garnishee. The Respondent answered that due process requires only notice. It knows of no authority that requires notice be given at a particular time. Due process simply requires notice sufficient to allow the principal-defendant to appear and defend.

16A C. J. S. Constitutional Law, Section 619, page 808 states:

"... it is held that mere seizure of his property, as in attachment or garnishment proceedings constitutes sufficient notice."

The second requirement of due process is that there be a hearing to determine the liability of the parties. The Respondent submits that this requirement is met by the statutes questioned.

Wis. Stat: 1965 267.16 provides for a determination of liability in the principal action but 267.15 also allows for a judicial hearing in the matter of the garnishment itself. This statute allows the principal-defendant to defend again.

Phillips v. Commissioner of Internal Revenue, 283 US 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1930) states:

"Where only property rights are involved, MERE POSTPONEMENT OF THE JUDICIAL INQUIRY IS NOT A DENIAL OF DUE PROCESS, if the opportunity given for the ultimate judicial determination of the liabilities is adequate."

16 Am. Jur, 2d Constitutional Law, Section 576, page 980, states:

"A party must not be deprived of his property without a judicial hearing, but the stage of proceedings at which the hearing shall take place and the manner in which the cause of the party shall be brought before the judicial tribunal, provided it is not an unreasonably inconvenient and embarrassing one, are within the legislative power.

Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered."

This last principle was upheld in Boynton Cab Co. v. Giese, 237 Wis. 237, 296 N.W. 630 (1941).

16 Am. Jur. 2d, supra, page 981 states:

"From the foregoing it follows, that although it is the general rule that everyone is entitled to a hearing as an essential part of due process of law, a statute is not merely unconstitutional because it authorizes a ministerial act by which possession of property is taken before the right to it has been judicially determined."

The petitioner argued that the creditor has not opportunity for hearing. The Respondent asserts that because there is not an early hearing the principal-defendant cannot plead his exemptions. In Pierce v. Chicago & Northwestern Railway Co., 36 Wis. 283, 287 states:

"...if the garnishee knows that the property, money or indebtedness in his possession or under his control, is exempt, it is his duty for self protection, to bring that fact to the notice of the court."

In fact, the creditor, by proper pleadings could have petitioned the court for an immediate trial which has in the past and at the present time been normally granted by the courts. In the case of Henderson v. Mutual Fertilizer Company (S. C., Ga., 1920) 104 S.E. 229, the court

held that the garnishment process was not a deprivation of due process of law or of the equal protection of law as guaranteed by the Constitution of Georgia or the United States.

In Eagleson vs. Rubin (S. C., Ida., 1909), 100P 765 it was held that "Due Process of Law" as used in the Constitution of Idaho and the United States as applied to judicial proceedings means that every litigant shall have the right to have his cause tried and determined under the rules of procedure, the same as applied to other similar cases; and when this is afforded him, a defendant cannot claim that due process of law is not being observed.

(Also See: Grannis vs. Ordean, 34 S. C. 779)

Not only do the Wisconsin Statutes meet the due process requirements and provide sufficient protections, statutes of this type have been upheld.

16A C. J. S. Constitutional Law, Section 613, page 762 states:

> "Particular provisional remedies which have been held as not denying due process under the circumstances include . . . garnishment. . . . "

6 Am. Jur. 2d Attachment & Garnishment, Section 5, page 563 states:

> "An attachment or garnishment is not a deprivation of property without due process of law within the meaning of constitutional

provisions, inasmuch as there must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim."

The leading case in this area is Byrd v. Rector, 163 S.E. 845, 81 A.L.R. 1213, 1216 (1932), wherein a garnishment before judgment statute was questioned, the court there said:

> "We think the answer to these propositions is that the defendant is not deprived of his property by reason of the levy of the copy of the attachment upon a person who is indebted to him or who has effects belonging to the defendant. The most that such procedure does is to deprive the defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process."

In McInnes v. McKay, 141 A. 699 (1928), wherein a statute like the one herein questioned was being questioned, the court there stated:

> "... it is not a deprivation without due process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized

tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied."

The Respondent submits that due process is met by the statutes questioned because notice and opportunity for a hearing are present and that further protections are present to secure the debtor's rights.

The more recent case United States v. Department of Corrections of State of Delaware, 268 F.S. 242 (1967) answering the question of the posting of a bond, the petitioner argued that there was a violation of the Equal Protection Law Clause inasmuch as a person similarly charged with one offense who could post bond, would avoid any further police interrogation while he, as one unable to meet bond requirements, was not given equal protection of the law with one who could make bail. The court there was not given equal protection of the law. In that case the court stated, "a state can, consistently with the 14th amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination'. Absolute equality is not required; lines can be and are drawn and we ought to sustain them."

GARNISHMENT AS A WEAPON FOR COLLECTION.

Petitioner in her argument dwelled upon the cases of unscrupulous merchants and lenders whose practices trap the so-called "unwilling workers." Today, in a socially conscious society the pendulum is swinging to protect the consumer. The Respondent agrees that there

are injustices in the garnishment and replevin attachment procedures but nothing is said about the average creditor who in most cases does not garnishee within 10 days but only after numerous notices and requests for payment are made over a long period of time.

It appears no one is concerned with the creditor who has either advanced monies "dollar for dollar" or merchandise which is consumed or used by the debtor without regard for his obligation to repay or return the merchandise used or the monies borrowed.

In the matter before the court the account in question was delinquent in excess of 2 years before any legal action was taken.

Petitioner states that garnishment is generally the weapon of predatory creditors. In our shifting society where debtors move from day to day or week to week it is the only method by which a merchant or lender can get his money or in the case of a replevin his merchandise.

The garnishment situation involved herein reminds the Respondent of the situation when employers had the upper hand over labor organizations and employees, subsequently, legislation was passed favoring labor. It appears now that there is an attempt to bring the equality between labor and management so that both parties will have equal rights and equal protection.

With the forthcoming Uniform Consumer Credit Code the consumer is getting needed protection and with the passage of the Consumer

Credit Protection Act a debtor will be receiving needed and long overdue protection. In both instances, these are actions of the legislature and not the judiciary.

Respondent is confident that after both of the actions referred to above as well as the new garnishment procedure as proposed by the Wisconsin Legislature have been in effect, changes will be made so that there is equal protection of both the lender and the borrower.

CONCLUSION

WHEREFORE, respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

SHELDON D. FRANK
Attorney for the Respondent

SIDNEY GRAY
Of Counsel

APPENDIX A

ORDER TO SHOW CAUSE
(Formal Parts Omitted)

Upon the Affidavit hereto annexed and upon all the records, files and proceedings had and on motion of Barbee & Jacobson, defendant's attorneys;

It Is Ordered, that the above named plaintiff, Family Finance Corporation of Bay View appear before the Honorable Thaddeus J. Pruss, County Judge in and for Milwaukee County, Room 403, in the Courthouse, at 901 North 9th Street, City of Milwaukee, County of Milwaukee, State of Wisconsin, on the 3rd day of January, 1967, at 9:00 o' clock A.M. or as soon thereafter as counsel can be heard to show cause why the garnishment proceedings in the above matter should not be dismissed on the merits for violating defendant's rights under the Wisconsin Constitution, Article 1, Section 9; and further defendant's due process and equal protection rights under the United States Constitution 14th Amendment.

It Is Further Ordered, that a copy of this Order to Show Cause, together with a copy of the Affidavit hereto annexed, be served upon the above named plaintiff at least 48 hours prior to the time set for hearing herein.

Dated at Milwaukee, Wisconsin, this 20rd day of December, 1966.

/s/ T. J. Pruss
County Judge

AFFIDAVIT OF THOMAS M. JACOBSON

State of Wisconsin,
County of Milwaukee, ss.:

Thomas M. Jacobson, being first duly sworn on oath deposes and says:

1. That on the 21st day of November, 1966 the plaintiff commenced an original action and garnishment proceedings against the defendant herein;

2. That plaintiff as a result of said garnishment action against defendant is responsible for the garnishee defendant in said matter holding $31.59 due defendant for wages;

3. That plaintiff has not legally established that defendant in fact owes plaintiff any amount of money nor reduced said claim to a valid judgment.

That the defendant's attorney makes this affidavit for the purpose of obtaining an Order directing the plaintiff to show cause why the garnishment action in the instant proceedings should not be dismissed for being in violation of defendant's constitutional rights under the Wisconsin Constitution, Article 1, Section 9 and the United States Constitution, 14th Amendment in that defendant is being deprived of her property without due process of law and further Wisconsin Statutes Chapter 267 permitting garnishment before judgment of a wage earner's salary treats said class unequally in comparison to other individuals similarly situated; that for said reason your Affiant asks the Court to declare Wisconsin's garnishment law before

judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 unconstitutional for the aforesaid reasons.

/s/ Thomas M. Jacobson
Thomas M. Jacobson

ORDER OF COUNTY COURT
(Formal Parts Omitted)

Wherefore an Order to Show Cause returnable before the Honorable Thaddeus J. Pruss of the County Court requiring the plaintiff to show cause why the garnishment proceedings in the above matter should not be dismissed on the merits for violating the defendant's rights under the Wisconsin Constitution, Article 1, Section 9 and further defendant's due process and equal protection rights under the United States Constitution 14th Amendment was signed by the Honorable Thaddeus J. Pruss December 23, 1966;

Wherefore Affidavit of defendant's counsel attached thereto indicated plaintiff commenced an original action and garnishment proceeding against defendant herein and pursuant thereto the garnishee defendant held $31.59 due defendant for wages;

Wherefore Affidavit of defendant's counsel attached thereto further indicated plaintiff had not legally established that defendant in fact owed plaintiff any amount of money nor reduced said claim to a valid judgment therefore defendant attorney's affidavit requested the Court to Order the plaintiff to show cause why the garnishment action in the instant proceedings should not be dismissed for being in violation of defendant's constitutional

rights under the Wisconsin Constitution, Article I, Section 9 and the United States Constitution, 14th Amendment in that defendant is being deprived of her property without due process of law and further Wisconsin's Statutes Chapter 267 permitting garnishment before judgment of a wage earner's salary treats said class unequally in comparison to other individuals similarly situated; that for said reason your Affiant asks the Court to declare Wisconsin's garnishment law before judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 unconstitutional, for the aforesaid reasons;

Wherefore a hearing was held pursuant to the Order to Show Cause before the Honorable Thaddeus J. Pruss: January 3, 1967 at 9:00 A.M. in his Courtroom in the Courthouse at Milwaukee, Wisconsin;

Wherefore at said hearing the plaintiff appeared by counsel Sheldon D. Frank and defendant appeared by counsel Thomas M. Jacobson;

Upon all the records, pleadings, and files herein it is

Now Therefore Ordered:

That the garnishment action in the instant proceedings does not violate defendant's constitutional rights under the Wisconsin Constitution, Article I, Section 9 and the United States Constitution 14th Amendment due process and equal protection;

That the said determination is for the legislature and not for the Court;

That Wisconsin's garnishment law before judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 is therefore not unconstitutional.

That defendant's attorney requests a stay in the garnishment action for purposes of appeal therefore the Court further Orders that all proceedings in the instant garnishment action be and hereby are temporarily stayed until further Order of this Court.

Dated at Milwaukee, Wisconsin, this 7th day of January, 1967.

/s/ Thaddeus J. Pruss
Thaddeus J. Pruss
County Judge

NOTICE OF APPEAL TO CIRCUIT COURT
(Formal Parts Omitted)

Please Take Notice that the defendant, Christine Sniadach, does hereby appeal to the Circuit Court of Milwaukee County, State of Wisconsin from the order made herein on the 6th day of January, 1967, by the Honorable Thaddeus J. Pruss, County Court Judge, which Order refused to dismiss the garnishment action herein on the basis the Wisconsin garnishment before judgment laws; to-wit, Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 did not deprive defendant of her constitutional rights under the Wisconsin Constitution, Article 1, Section 9,

and the United States Constitution 14th Amendment due process and equal protection.

Dated at Milwaukee, Wisconsin this 9th day of January, 1967.

/s/ Thomas M. Jacobson
Barbee & Jacobson
Martin R. Stein

Defendant's Attorneys

ORDER OF CIRCUIT COURT
(Formal Parts Omitted)

The appeal in this action having been brought before the Honorable George D. Young, Judge of the Circuit Court in and for Milwaukee County, and pursuant to Stipulation of the parties, judgment rendered after filing of briefs by both parties,

Now Therefore, upon motion of Sheldon D. Frank, attorney for the respondent, Family Finance Corporation of Bay View,

It Is Hereby Ordered:

That the judgment of the Honorable Thaddeus J. Pruss, Judge of the County Court, in favor of said respondent, Family Finance Corporation of Bay View and against the appellant, Christine Sniadach, alias, as rendered and entered on the 3rd day of January, 1967, holding that said action, a garnishment issued before the suit was instituted was constitutional and did not violate the due process and equal protection right of the appellant-defendant, be and same hereby is affirmed.

Dated at Milwaukee, Wisconsin, this 18th day of April, 1967.

/s/ George D. Young
Judge of the Circuit Court

Approved this 4th day of April, 1967
/s/ Thomas M. Jacobson
Thomas M. Jacobson, Attorney for Def.

NOTICE OF APPEAL TO SUPREME COURT
(Formal Parts Omitted)

Please Take Notice that the defendant-appellant, Christine Sniadach, does hereby appeal to the Supreme Court of the State of Wisconsin from the Order entered herein on the 18th day of April, 1967 by the Honorable George D. Young, Circuit Court Judge In and For Milwaukee County Branch Number One thereof, which Order affirmed the judgment of the Honorable Thaddeus J. Pruss, County Judge In and For Milwaukee County, Branch Number Six thereof, said judgment holding Wisconsin's garnishment before judgment statutes constitutional and not in violation of defendant-appellant's equal protection and due process guarantees.

Dated this 18th day of April, 1967.

/s/ Thomas M. Jacobson
Thomas M. Jacobson
Defendant-Appellant's Attorney

To: Sheldon D. Frank, Esq., Plaintiff's Attorney,
135 West Wells Street,
Milwaukee, Wisconsin
Clerk of Circuit Court, Milwaukee
County, Milwaukee, Wisconsin

MEMORANDUM DECISION OF CIRCUIT COURT
(Formal Parts Omitted)

PREFATORY

This is an appeal from Branch 6 of the County Court of Milwaukee County. The plaintiff above named commenced a garnishment action against the defendant and named the Miller Harris Instrument Co. garnishee. Thereafter, the defendant moved the Court below by way of an order to show cause requesting the dismissal of the action upon the ground that the proceeding violated the defendant's rights under Article I, Section 9, of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution.

The defendant appears now to have abandoned her contention that there has been a violation of Article I, Section 9, of the Wisconsin Constitution and now contends that the proceeding has violated her rights under Article VII, Section 2, of the Wisconsin Constitution.

MEMORANDUM DECISION

I

Article VII, Section 2, of the Wisconsin Constitution

Section 2 of Article VII provides in part that "The judicial power of this state, both as to matters of law and equity, shall be vested in a Supreme Court, Circuit Courts, Courts of Probate . . ."

The basis for this argument is that Chapter 267 contains a presumption made by the legislature that in all disputes between a creditor and his alleged debtor the creditor will prevail and the debtor must automatically prepare for satisfaction of the creditor's claim through immediate seizure of his property. It is argued that the plaintiff need only file the summons and complaint with the clerk who is then automatically required to issue what purports to be "an order of the County Court," although it commands not merely an appearance but disposes of the property, and that no judge is involved in any way in this process up to this point. This argument concludes that all authority to act in a preliminary dispute involving particular litigants has been withdrawn from the Court and is in effect decided by the legislature.

The foregoing argument does violence to the provisions of Chapter 267, Wis. Stats. It is true that the legislature has afforded a remedy not known to the common law for the protection of creditors. The remedy provided simply requires that the garnishee complaint must allege the existence of one of the grounds for garnishment, the amount of the plaintiff's claim, above all offsets, known to the plaintiff, and that the plaintiff believes the garnishee is indebted to or has property in his possession or under his control belonging to the defendant and that such indebtedness or property is not exempt from execution (Sec. 267.05 (1)).

Chapter 267 further provides that the garnishee summons and complaint shall be served on the principal defendant not later than 10 days after service on the garnishee as provided in Sec. 262.06 (Sec. 267.07). If the answer of the garnishee shows

a debt due the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, with interest and costs, to the clerk of the court. There is the further provision that the plaintiff may request the garnishee in writing to pay such sum to the clerk, and the garnishee must, within 5 days after receipt of such request, pay the sum to the clerk who then issues his receipt to the garnishee who is thereby released of all liability (Sec. 267.13). However, no trial is had in the garnishment action until the plaintiff has judgment in the principal action, which is dismissed in those cases in which judgment goes for the defendant (Sec. 267.16).

Wisconsin has held that garnishment before execution is a provisional remedy. Mahrle v. Engle, 261 Wis. 485. The Court is unable to find Wisconsin authority that directly rebuts the defendant's attack on Chapter 267 of the statutes, but it has long been held that a state may by appropriate legislation authorize the attachment or garnishment of property within its borders, subject to the limitations of the federal and state constitutions. An attachment or garnishment is not a deprivation of property without due process of law within the meaning of constitutional provisions, inasmuch as there must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim. Sec. 267.16 (1) does that very thing.

So far as the payment into court is concerned, no judicial process seems to be involved. The payment amounts to nothing more than a ministerial act to relieve the garnishee defendant of litigation and the funds come into the possession of the court

in custodia legis, and until adjudication in the main action has occurred nothing more than a temporary deprivation has occurred. That deprivation is of statutory creation in favor of the creditor which was in existence at the time the debt was created. In this connection the language of Byrd v. Rector, 112 W. Va. 192, 81 A.L.R. 1213, 1216, is particularly appropriate:

> "We think the answer to these propositions is that a defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process. In the meantime there has been no deprivation of property. The attachment, quasi rem in nature, has operated only to detain the property temporarily, to await final judgment on the merits of plaintiff's claim. No constitutional right is impaired. McInnes v. McKay, 127 Me. 110, 141 A. 699. Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp."

The Court does not believe there is any need for a judicial act until the defendant's liability to the plaintiff is before the Court.

II

Deprivation of Property Prior to Notice

Defendant argues that her property can be taken before she receives notice of the garnishment proceeding. This, of course, is based on the provisions set forth in Sec. 267.07 (1) which provide for service of a copy of the garnishee summons and complaint or a notice of such service be served not later than 10 days after service on the garnishee. It is argued that the garnishee defendant cannot only withhold defendant's wages but can file an answer asserting that he owes wages to the defendant and simultaneously pay a substantial portion of those wages to the clerk before any notice of the proceeding is given to the defendant. The argument concludes by stating that the defendant is given inadequate notice because such notice as he gets comes after the purpose of the garnishment is a fully accomplished fact. This is an erroneous view of the process.

The timeliness of the notice is truly the basis of the defendant's lament. The important fact, however, is that the defendant does have notice even though it may be given after his property is in custodia legis. Defendant's argument rejects the fact that nothing has happened to the defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff. The argument would deprive the garnishee defendant of a means whereby involvement in litigation might be terminated in order that a defendant

who contracted a debt with the provisional remedy in existence may have the use of his property.

Whether a debtor should be relieved of garnishment while an action for debt is pending is one involving legislative or public policy. When the legislative purpose has been declared in unmistakable language, it is not within the province of the Court to interpose contrary views of what the public need demands. Wait v. Pierce, 191 Wis. 202. And the courts have nothing to do with the policy of laws, their only duty is to interpret the laws as enacted by the legislature. Waldum v. Lake Superior T. & T. R. Co., 169 Wis. 137.

III

No Hearing Before Deprivation of Property

The thrust of the defendant's argument on this point is that she is not afforded the right to challenge the withholding of her wages prior to judgment in the main action and that she loses her property solely upon the service of summons and verified complaint in the garnishment action. This argument amounts to a paraphrasing of the second argument. Since the provisional remedy is constitutionally allowable a legitimate basis for garnishment exists. The argument that defendant is afforded no challenge to the withholding of her wages is ad hominem. If the main action falls, so then does the garnishment and no property belonging to the defendant is lost.

The debt was contracted with the provisional remedy in existence and became part of the contract. To deprive the plaintiff of that remedy would be an impairment of contract and constitutionally bad.

Defendant further argues that the main action involves a promissory note and since plaintiff's attorney is not personally privy to all the facts he should not be allowed to verify the complaint and the plaintiff should be required to personally verify the complaint. Just how this invades the defendant's constitutional rights is not made clear. Certainly the defendant has adequate statutory remedies, both investigative and procedural, which furnish an adequate basis for the protection of her rights.

IV

Violation of Due Process Because Lack of Notice Is Not Conditioned On Need For Summary Process

Defendant argues that absent a claim that a defendant is about to leave the employ of the garnishee, or is about to flee the state entirely, the employee's wages are a continuing asset against which the plaintiff can proceed even after judgment; that such an exercise of jurisdiction is normally authorized only where jurisdiction may not be established in any other manner or the defendant is taking steps which may frustrate the plaintiff's judgment.

It is supposed that garnishment was a legislative incentive for the extension of credit. A means whereby a seller might protect himself against persons not well known to him. Whatever the purpose, the legislature provided the remedy, and the defendant contracted her debt with the right of garnishment on the plaintiff's side. Defendant's argument begs the very reason for the statute. Whether the reason for the statute still exists or has ceased to exist is a matter for legislative determination.

V

Unconstitutional Interference With Appellant's Right To Gainful Employment--Violation of the Fourteenth Amendment to the United States Constitution

Defendant cites Slaughter-House Cases, 16 Wall. 36 (1873), as authority for the proposition that the right to pursue a gainful employment unimpeded by arbitrary state interference is a liberty preserved under the due process clause of the Fourteenth Amendment to the United States Constitution. Defendant goes on to argue that Chapter 267, Wis. Stats., deprives defendant of income earned without any demonstration that there is a need for such deprivation. Further, that persons of low income cannot post the bond in the amount of one and one-half times the sum in dispute and that, therefore, this remedy is illusory; that the deprivation of income is the most direct interference with the employment relationship, and that garnishment may cause an employee to be discharged by an employer.

Again, whether a creditor should be deprived of the provisional remedy in the case of a poor person is a matter for legislative determination. As matters now stand, the remedy does not exist until credit has been extended. If the remedy is drastic, it behooves the defendant to refrain from contracting debts beyond her ability to pay. Certainly this Court is without authority in law to override the legislative policy declared in Chapter 267, Wis. Stats. There is nothing arbitrary about establishing a provisional remedy in connection with the process of collecting a debt. Whether a need for that remedy exists is for the legislature to determine.

VI

Denial of Equal Protection of Law

Defendant argues that Chapter 267 deprives the defendant of equal protection of law in violation of the Fourteenth Amendment to the United States Constitution because it permits illegal discrimination between persons in similar circumstances. This argument is based upon the proposition that Sec. 267.22, Wis. Stats., permits garnishment of salaries and wages of public officers and employees after judgment only.

Chapter 267 does treat public employees different than members of the public at large as stated by the defendant. It has been held that this is a proper classification. 4 O.A.G. 783. The Court agrees with that opinion. The continuity of the public business may very well be the reason why garnishment may not lie against a public employee until after judgment. That reason may lend support to the defendant's previous argument concerning interference with her employment but it does not destroy the reason for the classification. The validity of differentiating between public and private employees effectively destroys defendant's argument in this respect.

CONCLUSION

The judgment of the County Court of Milwaukee County must be affirmed, and plaintiff's counsel will accordingly prepare an appropriate order for judgment, submit the same to counsel for the defendant for approval as to form, and thereafter offer the same for signing and entry.

Dated at Milwaukee, Wisconsin, this 15th day of March, 1967.

BY THE COURT:

/s/ George D. Young
Circuit Judge

OPINION OF SUPREME COURT OF WISCONSIN

And afterwards, to-wit on the 8th day of December, A. D. 1967, the same being the 61st day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

FAMILY FINANCE CORP. OF BAY VIEW,
Respondent,

-v.-

CHRISTINE SNIADACH, ALIAS,
Appellant,

MILLER HARRIS INSTRUMENT CO.,
Garnishee Defendant.

Opinion by Chief Justice Currie

This cause came on to be heard on appeal from the judgment of the Circuit Court for Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court for Milwaukee County herein be, and the same is hereby affirmed. (Justices Heffernan and Wilkie dissent. Opinion filed.)

No. 64

August Term, 1967

STATE OF WISCONSIN--IN SUPREME COURT

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

-v.-

CHRISTINE SNIADACH, ALIAS,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

Appeal from an order of the circuit court for Milwaukee County: GEORGE D. YOUNG, Circuit Judge. Affirmed.

Plaintiff finance corporation instituted a garnishment action in the county court of Milwaukee County naming Christine Sniadach as defendant and

Miller Harris Instrument Co. as garnishee. Both defendant and garnishee were served with copies of the verified garnishee complaint and the garnishee summons on November 21, 1966.

The garnishee complaint alleged that: a summons had been issued in an action by plaintiff finance corporation against defendant; judgment had not yet been entered; the action was one to recover damages upon a promissory note; and the amount of plaintiff's claim against defendant was $420 above all offsets. On November 30, 1966, the garnishee filed its answer in which it stated it had wages of $63.18 in its control belonging to defendant, and that it would pay one half thereof to defendant as a subsistence allowance and hold the other half subject to the further order of the court.

On December 23, 1966, defendant served on plaintiff's counsel and filed an order requiring plaintiff to show cause why the garnishment proceedings should not be dismissed for violating defendant's rights under Art. I, Sec. 9 of the Wisconsin Constitution, and under the due process and equal protection clauses of the United States Constitution. A hearing was held on January 3, 1967, and on January 7, 1967, the county court, Thaddeus J. Pruss, Judge, presiding, entered its order upholding the constitutionality of Wisconsin's garnishment before judgment statutes, secs. 267.02 (1) (a) 1, 267.05 (1), and 267.07 (1), Stats.

Defendant then appealed from this order to the circuit court. On April 18, 1967, the circuit court affirmed the county court's order, and defendant has appealed from the circuit court's order.

Currie, C. J. Appellant attacks the constitutionality of Wisconsin's garnishment before judgment statutes, secs. 267.02 (1) (a) 1, 267.05 (1), 267.07 (1), 267.16 (1), 267.18 (2), and 267.21, Stats., on a number of grounds based on injustices and deprivations which have been, or are likely to be, suffered by others, but which she has not personally experienced.

One such ground is that poor wage earners may have their wages garnished in a situation where there is no merit to the claim for which the principal action has been instituted. As a result such wage earners either are forced to settle with the plaintiff by assigning future wages, or are deprived of their wages for a long period of time until the principal action can be tried and probable cause determined. Here, appellant's indebtedness is on a note, and her affidavit in support of the order to show cause contains no allegation that she is not indebted thereon to plaintiff.

Another alleged ground of unconstitutionality is that sec. 267.18 (2) (a), Stats.,[1] makes no accommodation for defendants with more than one dependent.

---

[1] Sec. 267.18 (2) (a), Stats., provides: "When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50% of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action."

However, appellant received the benefit of the maximum subsistence allowance of one half of the amount of her garnished wages, and her affidavit does not allege how many dependents, if any, she has.

Another alleged ground of unconstitutionality is that sec. 267.21, Stats., which permits a defendant to post a bond and secure the release of his garnished property, denies equal protection of the laws to persons of low income. Appellant has made no showing that she is a person of low income and unable to post a bond.

A further alleged ground of unconstitutionality is that the garnishment before judgment statutes threaten the gainful employment of many wage earners. It is claimed that many employers discharge garnished employees for being unreliable. Appellant, however, has made no showing that her own employer reacted in this manner.

Still a further ground of attack is the provision in sec. 267.07 (1), Stats., which affords ten days' time to plaintiff to serve the garnishee summons and complaint on defendant after service of same on the garnishee. Here, appellant was served on the same day as the garnishee.

It is a long-accepted rule that a party may not urge the unconstitutionality of a statute upon a point not affecting his or her rights.[2] In State ex rel. Kellogg v. Currens,[3] the challenging party presented 11 grounds of attack upon the constitutionality of a statute. The court discussed the one which affected the challenger but refused to discuss the other ten, stating:

> ". . . Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions . . . We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others . . . ."[4]

Accordingly we will confine our consideration of appellant's grounds of attack upon the garnishment before judgment statutes to those directly affecting her. The grounds of attack which will thus be considered are:

---

[2] Scharping v. Johnson (1966), 32 Wis. 2d 383, 395, 145 N.W. 2d 691; Joint School Dist. v. Boyd (1955), 270 Wis. 222, 226, 70 N.W. 2d 630; Milwaukee Boston Store Co. v. Amer. Fed. of H. W. (1955), 269 Wis. 338, 357, 69 N.W. 2d 762; Anderson v. State (1936), 221 Wis. 78, 89, 265 N.W. 210; State ex rel. Kellogg v. Currens (1901), 111 Wis. 431, 87 N.W 561; 16 C.J.S., Constitutional Law, p. 226, sec. 76(a).

[3] Supra, footnote 2.

[4] Id. at pp. 442-443.

(1) These statutes deprive appellant of her property without due process of law.

(2) Appellant is denied due process of law, because the statutes afford her no right to an immediate hearing to challenge the validity of the garnishment.

(3) The legislature has assumed judicial powers in violation of art. VII, sec. 2, Wis. Const.

(4) The garnishment before judgment statutes deny appellant equal protection of the laws because they subject wage earners to harsher summary process than other classes of debtors.

Deprivation of Property Without Due Process.

The garnishment before judgment proceedings do not involve any final determination of the title to a defendant's property, but merely preserve the status quo thereof pending determination of the principal action. The defendant receives notice and a hearing before being permanently deprived of his or her property.

In McInnes v. McKay[5] it was contended that Maine's statute, which permitted attachment, without affidavit or bond, in advance of judgment, deprived the defendant of due process of law contrary to the fourteenth amendment of the United States Constitution. The relevant statute provided:

---

[5] (1928), 127 Me. 110, 141 Atl. 699.

"All civil actions, except scire facias and other special writs shall be commenced by original writs; which, in the Supreme Judicial Court, may be issued by the clerk in term time or vacation, and framed to attach the goods and estate of the defendant, and for want thereof to take the body, or as an original summons, without an order to attach goods and estate."[6]

The court held that this was

". . .not a deprivation without 'due process of law' for it is part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal."[7]

It noted that the attachment merely created a temporary lien, which did not destroy the defendant's title. The court also cited the United States Supreme Court's statement in Rothschild v. Knight[8] that to what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide.

---

[6]Maine Rev. Stats. 1928, ch. 86, sec. 2.

[7]Supra, footnote 5, at p. 116.

[8](1902), 184 U.S. 334, 341, 22 Sup. Ct. 391, 46 L. Ed. 573.

McInnes v. McKay was affirmed by the United States Supreme Court in a per curiam decision[9] on the authority of Ownbey v. Morgan[10] and Coffin Brothers v. Bennett.[11]

Ownbey v. Morgan upheld the constitutionality of Delaware's foreign attachment law as not being a denial of due process even though it harshly provided that before the defendant could appear and defend he had to give security in the amount of the value of the property attached. The court in its opinion declared:

> "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings . . . ."[12]

---

[9](1928), 279 U.S. 820, 49 Sup. Ct. 344, 73 L. Ed. 975.

[10](1921), 256 U.S. 94, 41 Sup. Ct. 433, 65 L. Ed. 837.

[11](1928), 277 U.S. 29, 48 Sup. Ct. 422, 72 L. Ed. 768.

[12]Supra, footnote 10, at pp. 110-111.

Coffin Brothers v. Bennett involved a Georgia statute which authorized the superintendent of banks to issue an execution against the property of a stockholder of a defunct bank upon whom a stock assessment had been levied. Mr. Justice Holmes wrote the unanimous opinion for the Court and stated:

> "The objection urged by the plaintiffs in error seems to be that this section purports to authorize an execution and the creation of a lien at the beginning, before and without any judicial proceeding. But the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors.' A reasonable opportunity to be heard and to present the defence is given and if a defence is presented the execution is the result of a trial in Court. The Fourteenth Amendment is not concerned with the form. Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 42. The fact that the execution is issued in the first instance by an agent of the State but not from a Court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection . . . ."[13]

While neither Ownbey v. Morgan nor Coffin Brothers v. Bennett involved garnishment before

---

[13] Supra, footnote 11, at p. 31.

judgment statutes, their rationale, when cited by the United States Supreme Court as authority for affirming McInnes v. McKay becomes clear. It is that the creditor's remedies involved, though harsh, did not deprive a man of his property without notice and an opportunity to be heard.

The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times.[14] In regard to the constitutional relevance of antiquity, Mr. Justice Holmes has stated:

> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by Ownbey v. Morgan, 256 U.S. 94, 104, 112."[15]

---

[14] 1 Wade on Attachment (1886), pp. 19-22, sec. 1.

[15] Jackman v. Rosenbaum Co. (1922), 260 U.S. 22, 31, 43 Sup. Ct. 9, 67 L. Ed. 107. See also Frank v. Maryland (1959), 359 U.S. 360, 370, 79 Sup. Ct. 804, 3 L. Ed. 2d 877, in which Mr. Justice Frankfurter cites Jackman and Ownbey as to the legal significance of a long and consistent history of state practice.

We deem a West Virginia decision, which dealt with a before judgment garnishment, to be apposite. In Byrd v. Rector[16] the nonresident defendant, who had been garnished before judgment, argued that he had been denied due process because the plaintiff had not been required to post a bond before the garnishment. The court stated:

> "We think the answer to these propositions is that a defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process. In the meantime there has been no deprivation of property. The attachment, quasi rem in nature, has operated only to detain the property temporarily, to await final judgment on the merit's [sic]of plaintiff's claim. No constitutional right is impaired. McInnes v. McKay, (Me.) 141 Atl. 699. Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp. Under no circumstances

---

[16](1932), 112 W. Va. 192, 163 S.E. 845.

could it be converted into cash and applied on the plaintiff's demand prior to final adjudication of the merits of the controversy between plaintiff and defendant. Now, if pending such determination, the defendant is inconvenienced because he is temporarily deprived of the possession and use of his property in the hands of the garnishee, the defendant may acquire possession by giving bond, for which provision is made by Official Code, 38-7-20. We find no error under this point."[17]

In view of the aforecited authorities, we determine that Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law.

Failure of Garnishment Statutes to Afford Appellant an Immediate Hearing

Sec. 267.16 (1), Stats., provides:

"No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs."

Appellant contends that the failure of the garnishment statutes to afford her an immediate hearing on the propriety of the garnishment constitutes a denial of due process.

---

[17] Id. at p. 198. See also 16 Am. Jur. 2d, Constitutional Law, p. 980, sec. 576.

However, despite the fact that the garnishment statutes do not grant to appellant the right of judicial review of the propriety of the garnishment action prior to trial of the principal action, Wisconsin case law establishes that she can obtain such judicial review.

In Orton v. Noonan[18] the court stated in regard to garnishment before judgment:

> ". . . the court, without the aid of any express statutory provision, has a general power to control and regulate the proceeding upon summary process of this nature, so as to correct or prevent any abuse or misuse of such process, and that the defendant may, in some proper form, contest the truth of the grounds alleged by the plaintiff for obtaining it."[19]

Thus the court's power to control its process is inherent and requires no statutory authorization.

This court in Chernin v. International Oil Co.[20] reaffirmed the right of a defendant to move to quash or dismiss the garnishment action to the point of a judicial ascertainment that a good-faith controversy exists. The procedure approved therein was a motion for summary judgment dismissing the garnishment action on the ground that the complaint in the

---

[18](1871), 27 Wis. 572.

[19]Id. at p. 579.

[20](1952), 261 Wis. 308, 52 N.W. 2d 785.

principal action failed to state a cause of action "for damages founded upon contract" as required by then sec. 267.01 (3), Stats. Such requirement is now to be found in present sec. 267.02 (a).

Thus potential abuses of garnishment before judgment are subject to judicial review before trial of the principal action. Moreover, a garnishment without probable cause can be the basis of a suit for malicious prosecution.[21] We, therefore, find no denial of due process in the failure of the garnishment statutes to contain a provision for judicial review of the propriety of a garnishment action prior to trial of the principal action, inasmuch as such right exists independently of statute.

Assumption of Judicial Powers

Sec. 267.04, Stats., provides in part as follows:

"(1) Upon payment to the clerk of court of a clerk's fee of $2 and a suit tax of $1, the clerk shall issue a garnishee summons . . .

"(2) The garnishee summons shall be substantially in the following form:

". . .

"You are ordered to retain such property [belonging to the defendant] and make no payment, except for subsistence allowance if any, to the principal defendant pending the further order of the court.

---

[21] Novick v. Becker (1958), 4 Wis. 2d 432, 90 N.W. 2d 620.

". . .

"(3) A garnishment action shall be commenced by the service of a garnishee summons and annexed verified complaint."

In regard to the complaint, sec. 267.05 (1), Stats., provides:

"The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in s. 268.02 (1) (a), the amount of the plaintiff's claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is, to the best of plaintiff's knowledge and belief, not exempt from execution."

The plaintiff must file with or mail to the clerk of court a copy of both the garnishee summons and complaint before serving the garnishee-defendant.[22] We deem a more accurate statement of appellant's position to be that the legislature has attempted to unconstitutionally vest judicial powers in an administrative officer.

This court in 1927 in State v. Van Brocklin[23] upheld the constitutionality of a state statute which

---

[22] Sec. 267.10, Stats.

[23] (1927), 194 Wis. 441, 217 N.W. 277.

conferred power on a clerk of court to issue a search warrant upon determining probable cause against the contention that this violated art. VII, sec. 2, Wis. Const. The court quoted with approval from the Alabama case of Kreulhaus v. Birmingham[24] as follows:

> "'. . .it was not the intention of the framers of the Constitution to deny to the Legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary, properly so called, many duties involving inquiries in their nature judicial.'"[25]

While some members of this court question some of the reasoning employed by the court to reach the result in State v. Van Brocklin, we approve of the holding that some duties involving inquiries judicial in their nature may be delegated to administrative officers where the acts of such officers are later subject to judicial review.

In Central Loan & Trust Co. v. Campbell[26] the United States Supreme Court considered the argument that a territorial statute of Oklahoma was void, because it allowed a probate judge to issue a writ of attachment, while the organic act of the territory vested all common law jurisdiction in the Supreme Court and District Courts of Oklahoma. The court rejected this argument, and stated:

[24](1909), 164 Ala. 623, 51 So. 297.

[25]Id. at p. 629.

[26](1899), 173 U.S. 84, 19 Sup. Ct. 346, 43 L. Ed. 623.

"On the face of the Oklahoma statute it is apparent that it is required as a prerequisite to the issuance of an attachment that the affidavit, in support thereof, shall simply state the particular ground for attachment mentioned in the act, and therefore that the granting of an order for attachment does not involve the discharge of a judicial function, but merely the performance of a ministerial duty, that is, the comparison of the language of the affidavit with the terms of the statute . . . It is elementary that where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court."[27]

As appears from the prior quotation herein from Coffin Brothers v. Bennett,[28] the United States Supreme Court also found unobjectionable the fact that the execution had been issued by the state superintendent of banks instead of a court. However, the court was there concerned with the due process clause of the fourteenth amendment rather than the issue of unconstitutional delegation of judicial power contrary to a state constitution.

We find no merit to appellant's contention that sec. 267.04, Stats., violates art. VII, sec. 2, Wis. Const.

---

[27] Id. at pp. 95-96.

[28] Supra, footnote 11.

Denial of Equal Protection of the Laws

Appellant's brief asserts that the garnishment before judgment statutes subject wage earners to harsher summary process than other classes of debtors. However, any debtor, wage earner or not, is subject to these statutes. For example, bank accounts of businessmen and corporations are subject to garnishment before judgment. It may be argued generally that the effect of garnishment before judgment is harsher on wage earners than other classes of debtors. However, appellant has not set forth how these statutes, as applied to her own particular situation, have denied her equal protection of the laws. We decline to consider this argument of denial of equal protection in the absence of facts substantiating such contention.

Pending Legislation

This court is fully cognizant of the fact that many undue hardships have resulted from the operation of Wisconsin's before judgment garnishment statutes in the cases where wages and salaries of employees have been garnished. We are pleased that there is pending before the present legislature legislation that will remedy these abuses.

On November 14, 1967, the assembly passed by a vote of 89 to 5 Substitute Amendment 1, to Bill No. 454, which bars garnishment before judgment of the wages or salary of the principal defendant. The State Senate now has this measure before it.

By the Court. ---Order affirmed.

DISSENTING OPINION OF SUPREME COURT OF WISCONSIN

(Filed December 8, 1967)

STATE OF WISCONSIN

In Supreme Court

August Term, 1967

No. 64

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

-v.-

CHRISTINE SNIADACH, alias,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

Heffernan, J. (dissenting) The majority opinion would lead one to believe that garnishment before judgment is a venerable practice of Anglo-Saxon jurisprudence and should be accorded the imprimatur of time. Yet, the fact of the matter is that this is a rather new development in Wisconsin law. The excellent brochure written by Paul L. Moskowitz for the Wisconsin Extension Law Department states:

"Chapter 267 of the Wisconsin Statutes (1959) comes from R.S. 1878, Section 2752.

The statute in Wisconsin originally provided garnishment as a remedy in aid of execution only. Many states still follow this law." 1962 Wisconsin Lawyers' Seminars, Wisconsin Garnishment and Exemptions, p. 1.

Garnishment is strictly a statutory remedy. Markman v. Becker (1959), 6 Wis. 2d 438, 95 N. W. 2d 233. Thus, it is apparent that it is no great sacred bastion of the common law that is under assault in this case. The only question is whether legislative action has deprived the defendant and others similarly situated of their constitutional rights.

The majority concludes that the garnishment statute does not result in a deprivation of property. The rationale behind this is embodied in the majority's quotation from Byrd v. Rector (1932), 112 W. Va. 192, 163 S.E. 845. The essence of that quotation is that there is no deprivation of the defendant's property because the procedure places the defendant's property in the hands of the law and not in the hands of the plaintiff until after judgment.

It strikes me that this reasoning is most unrealistic. The constitutional question is not whether defendant has lost his title to the property, nor whether another has gained its beneficial use. The test is whether he was deprived of his property. In the instant case no legal fiction can disguise the fact that, from the time of the service of the garnishee summons until the lien of that process is released, the defendant is unable to make any beneficial use of his wages other than the pittance which may be available to him either as an exemption or subsistence allowance. Moreover, the case of Byrd

v. Rector is only of strained applicability in the present case. In that case an infant plaintiff, who had been injured by the explosion of a dynamite cap which had been negligently disposed of by a nonresident defendant, commenced a suit in tort for his personal injury. Accordingly, an attachment was issued on the ground that the defendant was a nonresident. The Byrd Case furnishes a sound rationale in support of our attachment laws, and were the plaintiff's attack on the attachment procedures, ch. 266 of the Wisconsin statutes, the citation would be more appropriate. Chapter 266 recognizes that attachment is an unusual remedy--to be resorted to only in special circumstances. It is designed to protect state residents from creditors whose conduct amounts to fraud or from foreign creditors who have assets within the state. The Byrd Case situation is clearly contemplated by sec. 266.03(2) (a):

> "(2) Tort Action. In tort actions the affidavit shall state that a cause of action in tort exists in favor of the plaintiff and against the defendant, that the damages sustained exceed fifty dollars specifying the amount claimed and either:
>
> "(a) That the defendant is not a resident of this state. . . ."

The case of Ownbey v. Morgan (1921), 256 U.S. 94, 109, 41 Sup. Ct. 433, 65 L. Ed. 837, points out that the attachment of the goods of a foreigner is to be treated uniquely and is dependent in part on the duty of a state to protect its own citizens in their claims against nonresident owners of property situate within the state. The Ownbey Case uses a rather quaint, archaic, and unacceptable rationale

in concluding that there is no denial of due process when a debtor's property is detained, stating:

> "[A] man who has property usually has friends and credit--and hence in its normal operation it must be regarded as a permissible condition; and it cannot be deemed so arbitrary as to render the procedure inconsistent with due process of law . . . ." P. 111.

This same case stressed the origins of the attachment procedure and pointed out that its purpose was to distrain the defendant's property to assure the appearance of the defendant so that there could be a procedure in personam against him. It is clear that Ownbey v. Morgan has little relevance to the Wisconsin law which permits the garnishment of wages of Wisconsin residents.

While McKay v. McInnes (1928), 279 U.S. 820, 49 Sup. Ct. 344, 73 L. Ed. 975, is relied upon by the majority, it appears that the United States Supreme Court without opinion merely affirmed the Maine court on the basis of Ownbey v. Morgan, supra, and Coffin Brothers v. Bennett (1928), 277 U.S. 29, 48 Sup. Ct. 422, 72 L. Ed. 768. As pointed out above, Ownbey is not applicable to this case. The Coffin Brothers opinion is a rather cursory one by Mr. Justice Holmes in which he justifies his conclusion on the basis that it is a "familiar method in Georgia." This is hardly a persuasive rationale; and as pointed out above, it is specious reasoning to conclude that, because a debtor has a chance to be heard on the question of whether or not his property should be returned to him, he has not been deprived of his property in the interim. Moreover, Mr. Justice Holmes points out that the defendants "are allowed to raise and try every possible

defense by an affidavit of illegality." (Emphasis supplied.) The Wisconsin statute provides for no such comprehensive mode of defense available at the inception of the suit.

While some of the reasoning in these cases is appropriate to the garnishment of property, it has little or no relevance to the garnishment of wages. The garnishment of wages is uniquely a product of the accrual bookkeeping system which has only come to fruition in the twentieth century. Until recently, laborers were paid by the day and not by the week or month. Hence, the law of garnishment in terms of historical precedent arose out of the garnishment of property other than wages. There is little pertinence in the majority's statement that the right to place a lien upon a man's property dates back to medieval England and Roman times. Accrued wages, in terms of the history of the law, are a new property right and should be treated by the law with that distinction in mind.

It should also be noted that until recently wages were totally exempt from garnishment. Rood on Garnishment (West's, 1896), sec. 87, page 119, states the policy of the wage exemptions that was nearly universal until near the end of the nineteenth century:

> "The policy of the law--the intent of the legislature in enacting these provisions--is too plain for argument. It was to secure to those who toil with their hands, or depend for their subsistence upon their personal earnings, a sufficient amount of the fruits of their labor to supply them and their families with the necessities of life, and a few of the conveniences of modern civilization, free from the merciless grasp of their less needy creditors."

It was not until the enactment of ch. 141 of the Laws of Wisconsin (1883) that the exemption for wages was in part abandoned. [1]

I would concede that it is not unconstitutional to deprive a defendant of his property, including wages, by garnishment and to hold it in custodia legis for a limited period of time so that the creditor can be certain that the assets are there to satisfy its judgment when once obtained. Under the Wisconsin statutes, however, the plaintiff need not serve his summons on the defendant until ten days after he has served the garnishee. This is a clear denial of due process, for the wages of the defendant are distrained without the necessity of notice to their equitable owner. As the majority opinion clearly points out, however, there is no allegation that this particular denial of justice took place in the instant case. It should be noted, however, that the very case relied upon by the court, Ownbey v. Morgan, supra, page 103, states that, in determining whether there is a denial of due process, the court is not confined to the particular case at hand but is to make its determination " . . . with respect to the general effect and operation of the system of procedure established by the statutes." While Ownbey takes the position that the unusual case of hardship should be overlooked in favor of the general statutory scheme, it is obvious that the converse reasoning is equally applicable.

---

[1] An earlier enactment, ch. 317, Laws of Wisconsin (1882), provided for an exemption of all wages for three months prior to the garnishment.

The defendant complains, however, that even though the notice is given simultaneously, i. e., by a concurrent service on both the principal defendant and the garnishee, nevertheless, the property is withheld unconscionably until there has been a trial of the principal action. The majority dismisses this contention by stating that it is in the inherent power of a court to prevent any abuse or misuse of the process and that the defendant may, as said in Orton v. Noonan, infra, "in some proper form" contest the truth of the grounds alleged by the plaintiff.

This court has defined that right to contest the plaintiff's use of process in Chernin v. International Oil Co. (1952), 261 Wis. 308, 52 N.W. 2d 785, and it is apparent that the defendant's rights are in fact limited to the determination of whether a good faith controversy exists. Orton v. Noonan (1871), 27 Wis. 572, quoted by the majority, makes it clear that all the plaintiff has to do to satisfy this requirement is the making and filing of an affidavit of indebtedness to the plaintiff. And Chernin v. International Oil Co. merely determined that where the complaint in the principal action alleges a cause of action for damages for breach of contract the garnishment action will not be dismissed.

Under the state of law as it now stands, unless the plaintiff's complaint is demurrable or on its face fraudulent there is no relief available to the defendant short of the trial of the principal action. There is no statutory or common law procedure whereby the defendant can in a timely or summary fashion "raise . . . every possible defense by an affidavit of illegality," as described in Coffin Brothers v. Bennett, supra. The right to a prompt and

summary defense on the merits that Mr. Justice Holmes found as a saving grace in Coffin is fatally absent in the instant case.

Nor do I consider the possibility of a malicious prosecution action to be much solace to a wage owner who has been oppressed by an improper garnishment procedure action. If he has the resources to commence a retaliatory action for damages, he most likely would have been able to successfully defend himself in a garnishment action. The majority reasoning is similar to that of Ownbey where the United States Supreme Court concluded that the defendant's property would not have been seized if he were not a man of property and, hence, he should be able to take care of himself. The circuity of the court's reasoning is not acceptable to me.

I conclude that a major constitutional defect of the statute is its failure to provide for a mandatory trial on the merits within a limited and statutorily defined time following the seizure of the defendant's wages.

I am in agreement with the majority's point that the issuance of a garnishee summons by the clerk of court does not constitute the usurpation of judicial power. I am, however, in complete disagreement with the rationale by which it arrives at that conclusion. Its conclusion is supported by the reliance on two discredited cases. The first of these is State v. Van Brocklin (1927), 194 Wis. 441, 217 N.W. 277. In this case the question was whether a statute which permitted the clerk of the Winnebago county court to issue a search warrant constituted the proper exercise of judicial power. The court in Van Brocklin found an implied authorization

for such delegation of power in sec. 23, art. VII, of the Constitution, which manifestly was designed to provide for the appointment of court commissioners exercising the power of a judge in chambers. The court concluded that if the legislature had that power it undoubtedly had the residual power to authorize clerks of municipal courts to issue criminal warrants. It is submitted that this hardly follows. At any rate this court has subsequently, in White v. Simpson (1965), 28 Wis. 2d 590, 137 N. W. 2d 391, clearly ruled that only a magistrate exercising judicial power is authorized to issue a warrant, making it clear that the question of probable cause is not to be left to an administrative officer. Giordenello v. United States (1958), 357 U. S. 480, 486, 78 Sup. Ct. 1245, 2 L. Ed. 2d 1503, used the language, "The Commissioner must judge for himself the . . . facts . . . to show probable cause." (Emphasis supplied.) The other case relied upon by the majority, Kreulhaus v. Birmingham (1909), 164 Ala. 623, 51 So. 297, held that the statute that permitted a clerk to issue warrants of arrest did not confer any judicial power. The rationale of the Alabama court was:

> "The statute in this case conferred no power upon the clerk to finally hear and determine, nor even to commit to bail, but only to issue warrants, which must be construed to authorize him to issue warrants on probable cause . . . ." Pp. 629-630.

It is obvious that following the White v. Simpson rationale, this case is equally repugnant to our now accepted standards of due process.

I agree with the court's rationale that the only determination required of the clerk is a ministerial

one, that is, it is only necessary for the plaintiff to set forth in the language of the statute the basis upon which the summons is requested. This is not a determination of probable cause. It is not a judicial function and is not constitutionally prohibited. I object, however, to the majority's failure to rest their position upon this perfectly good argument. Instead they have chosen to shore up this rationale with outworn precedents of extremely dubious authority, and by so doing have put the ruling of White v. Simpson in jeopardy.

In view of my views set forth above, I must respectfully dissent from the court's opinion. I am convinced that the plaintiff has established that she is personally aggrieved to the extent that she may properly raise at least some of the constitutional issues which she presses. Since I find her complaint has validity as set forth above, I would hold the garnishment statute unconstitutional in that it deprives the defendant of property--wages--without due process of law--in that she lacks any method of insuring a reasonably prompt adjudication of her rights and the return of her property. I also dissent because the majority opinion has failed to state adequately what I conceive to be its true position--that the affirmance of the trial court results not from a conviction that the trial court is correct on the constitutional question, but rather on the fact that this particular plaintiff has not been aggrieved. The court was no doubt influenced by the legislative progress of the bill that would end the garnishment of wages prior to judgment. There is an understandable willingness to "let sleeping dogs lie" when there exists the strong possibility that the legislature will shortly correct this harsh and unconstitutional legislation. I believe, however, that this court

would be remiss in its constitutional duties if it did not hold a statute unconstitutional if in fact it appears to be so, even though the legislature is about to fashion a correction. Since I believe the statute to be in part unconstitutional, I would reverse.

I am authorized to state that Mr. Justice Wilkie joins me in this dissent.

MOTION FOR REHEARING DENIED

And afterwards, to-wit on the 27th day of February, A. D. 1968, the same being the 97th day of the August, 1967 Term, the following proceedings were had in said cause in this Court:

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

-v.-

CHRISTINE SNIADACH, alias,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in said cause, it is now here ordered that said motion be, and the same is hereby, denied with costs.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes of the State of Wisconsin:

(a) Wis. Stat. Sec. 267.01 (1967 Pocket Part)

(1) Any creditor may proceed against any person who is indebted to or has any property in his possession or under his control belonging to such creditor's debtor, as prescribed in this chapter. "Plaintiff" as used in this chapter includes a judgment creditor and "defendant", a judgment debtor.

(2) Except as otherwise provided in this chapter, the procedure in garnishment actions shall be the same as in ordinary civil actions.

(2a) A garnishment action is a separate action.

(3) An individual may commence a garnishment action in his own person and in his own behalf, or by an attorney licensed to practice in the courts of this state, but not otherwise. Garnishment actions on behalf of any other party shall be commenced only by attorneys licensed to practice in the courts of this state.

(4) No garnishment action shall be brought to recover the price or value of spirituous, malt, ardent or intoxicating liquors sold at retail.

(b) Wis. Stat. Sec. 267.02 (1967 Pocket Part)

(1) A plaintiff may commence a garnishment action at any time after:

(a) A summons is issued: 1. In an action for damages founded upon contract, express or implied (or in a contract action where a writ of attachment could issue on demands not yet due under s. 266.03(3)). 2. In an action upon a judgment. 3. In a tort action where a writ of attachment could issue under s. 266.03(2).

(b) An execution upon an in personam judgment is issuable.

(2) If wages or salary are the subject of a garnishment action, and payment of wages or salary to the defendant is, has been, or should be, withheld therein, plaintiff may not commence any other garnishment action affecting the wages or salary of the principal defendant prior to judgment in the principal action.

(3) Except as provided in sub. (2), the plaintiff may, in like manner, subsequently proceed against other garnishees, or, if he has reason to believe they have subsequently become liable, against the same garnishee.

(c) Wis. Stat. Sec. 267.05 (1967 Pocket Part)

(1) The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in s. 267.02(1) (a), the amount of the plaintiff's claim against the defendant, above

all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is, to the best of plaintiff's knowledge and belief, not exempt from execution.

(d) Wis. Stat. Sec. 267.07 (1967 Pocket Part)

(1) Except as provided in s. 267.05(4), the garnishee summons and complaint shall be served on the garnishee as required for the exercise of personal jurisdiction under ch. 262, and notice of such service in substantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal defendant as required for the exercise of personal jurisdiction under ch. 262, not later than 10 days after service on the garnishee as provided in s. 262.06.

(e) Wis. Stat. Sec. 267.13 (1967 Pocket Part)

(1) If the answer shows a debt due to the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, as stated in the garnishee complaint, with interest and costs, to the clerk of the court. If prior to so doing, the plaintiff in writing requests the garnishee to pay such sum to such clerk, the garnishee shall, within 5 days after receipt of such request, pay the sum to the clerk. The clerk shall give his receipt therefor to the garnishee. Such payment shall discharge the garnishee of all liability for the amount so paid.

(2) If the debt disclosed is not due, this section shall apply when it becomes due, with like effect.

(3) If the garnishee fails to pay such sum within 5 days after receipt of such request, the plaintiff shall be entitled to judgment against the garnishee for the amount disclosed, when due, either before or after judgment in the original action and may collect the same by execution; but in case no judgment has been rendered in the principal action the execution against the garnishee shall require the sheriff to pay the money collected into court to abide the event of the principal action. Moneys paid into court shall be paid to the plaintiff when final judgment is rendered in his favor, and to the extent of satisfying the same, upon order of the court, and any balance to the party entitled thereto.

(4) If no such request is made and the garnishee does not elect to pay such sum to the clerk, the garnishee shall hold the same until order of the court. No stipulation between the plaintiff and the defendant shall be honored by the garnishee, until signed and approved by the court.

(5) If judgment is against the plaintiff such moneys shall be paid to the defendant.

(f) Wis. Stat. Sec. 267.16 (1967 Pocket Part)

(1) No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs.

(2) The court may adjudge the recovery of any debt, the conveyance, transfer or delivery to the sheriff or any officer appointed by the judgment of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand; or by the judgment pass the title thereto; and may therein or by its order direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid or delivered to the clerk or officer. The judgment against a garnishee shall discharge him from all demands by the defendant for all property paid, delivered or accounted for by the garnishee, by force of such judgment.

(g) Wis. Stat. Sec. 267.18 (1967 Pocket Part)

(1) From the time of the service of the summons and complaint upon the garnishee he shall stand liable to the plaintiff for the property then in his possession or under his control belonging to the defendant or in which he is interested to the extent of his right or interest therein and for all his debts due or to become due to the defendant, except such as are exempt from execution, but not in excess of the amount of the plaintiff's claims as disclosed by his garnishee complaint together with 25 per cent of the amount claimed in the garnishee complaint but not less than $25 nor more than $500 to secure costs.

(2) (a) When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be

payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

(b) If the court determines that the principal defendant is entitled to an exemption in excess of the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be set off and applied against said exemption. If the court determines that the principal defendant is entitled to an exemption less than the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be the exemption to which the principal defendant is entitled in such garnishment action.

(h) Wis. Stat. 267.20 (1967 Pocket Part)

Except upon the order of a judge no action shall be commenced by the defendant or his assignee against a garnishee upon any garnished claim or demand or to recover any property garnished, or execution be issued upon a judgment in favor of defendant against such garnishee, until the termination of the garnishment; and if an action has been commenced or an execution issued it shall be stayed by the court or a judge thereof as to the garnishee upon his application.

INDEX TO APPENDIX

Page

Appendix A:

Order to Show Cause..... 1b

Affidavit of Thomas M. Jacobson..... 2b

Order of County Court.....3b

Notice of Appeal to Circuit Court..... 5b

Order of Circuit Court.....6b

Notice of Appeal to Supreme Court.....7b

Memorandum Decision of Circuit Court....8b

Opinion of Supreme Court of Wisconsin..: 17b

Dissenting Opinion of Supreme Court of Wisconsin.....36b

Motion for Rehearing Denied..... 46b

Appendix B:

Statutory Provisions Involved.....47b

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 6 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 130

CHRISTINE SNIADACH,

Petitioner,

v.

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
GABRIELLE A. KIRK
PHILIP G. SCHRAG
10 Columbus Circle
New York, New York 10019

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Attorneys for Petitioner

WILLIAM F. YOUNG, JR.
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1968

No. 130

CHRISTINE SNIADACH,

Petitioner,

v.

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

The legal issue in dispute in this case is squarely presented by the briefs filed by the parties. However, petitioner must reply to a serious factual inaccuracy in respondents' reply.

On page 6 of respondents' brief, it is stated that

> in fact, the State of Wisconsin by legislative action instituted a new garnishment law and procedure so that within a short time the law, as presently on the books, will be radically changed. This is itself a clear indication that the Legislature saw the need for a change and took such action as was necessary to effect the change.

And on page 14 reference is made to

> the new garnishment procedure as proposed by the Wisconsin Legislature. . . .

These passages should not be interpreted to mean that Wisconsin has enacted a new law prohibiting pre-judgment garnishments. Such a bill introduced in the Wisconsin Legislature in 1967, and was referred to in the opinion below of the Wisconsin Supreme Court (A. 32a), but it never reached the floor of the State Senate. A new bill to prohibit pre-judgments garnishments (Assembly Bill 121) was introduced on January 30, 1969 (the date of service of respondents' response), but is obviously far from enactment. Wisconsin's pre-judgment garnishment law is very much in force, and the writ prayed for should be granted so that this Court may judge its constitutionality.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
GABRIELLE A. KIRK
PHILIP G. SCHRAG
10 Columbus Circle
New York, New York 10019

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Attorneys for Petitioner

WILLIAM F. YOUNG, JR.
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	3
How the Federal Question Was Raised and Decided Below	4
Summary of Argument	5
ARGUMENT	
Introduction	7
I. Prejudgment Garnishment Procedure Is Widely Used to Compel Wage Earners to Make Favorable Settlements With Their Alleged Creditors Without Hearing or Trial	8
Garnishment as a Weapon for Collection	10
Garnishment and Personal Bankruptcies	15
II. The Use of Prejudgment Wage Garnishment When It Is Not Needed to Obtain *In Rem* Jurisdiction Deprives Employees of Due Process of Law	18
CONCLUSION	25
APPENDIX	
Statutory Provisions Involved	1a

TABLE OF CASES:

	PAGE
Byrd v. Rector, 112 W.Va. 192, 163 S.E. 845 (1932)	5, 23
Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915)	18
Coffin Brothers v. Bennett, 277 U.S. 29 (1928)	21
Coffin Brothers v. Bennett, 164 Ga. 350, 138 S.E. 670 (1927)	21
Grannis v. Ordean, 234 U.S. 385 (1914)	19
Harris v. Balk, 198 U.S. 215 (1905)	21
Hovey v. Elliot, 167 U.S. 409 (1937)	9
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	19
Kelly v. Wyman, —— F. Supp. ——, 37 U.S.L. Week 2324 (S.D. N.Y. 1968)	19
Londoner v. Denver, 210 U.S. 373 (1908)	19
McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928)	22, 23, 24
McKay v. McInnes, 279 U.S. 820 (1928)	22
Morgan v. United States, 304 U.S. 1 (1938)	19
Noble State Bank v. Haskell, 219 U.S. 104 (1911)	24
Ownbey v. Morgan, 256 U.S. 94 (1921)	20, 21, 22
Schroeder v. New York, 371 U.S. 208 (1962)	19
Southern Ry. Co. v. Virginia, 290 U.S. 190 (1933)	19
Windsor v. McVeigh, 93 U.S. 274 (1876)	9

STATUTES:

PAGE

Federal Consumer Credit Protection Act, Sec. 304 13

28 U.S.C. § 1257(3) 2

Nev. Rev. Stat. § 31.010 9

McKinney's Cons. Laws of N. Y., C.P.L.R. § 5252 13

Gen. Stats. of N. C. § 1-440.2-3 9

Ohio Rev. Code § 2715.11 9

Wisc. Stat. Ann. § 267.02 (1967 Pocket Part) 3, 8, 9, 22

Wisc. Stat. Ann. § 267.04 (1967 Pocket Part) 3, 8, 20

Wisc. Stat. Ann. § 267.05 (1967 Pocket Part) 8

Wisc. Stat. Ann. § 267.16 (1967 Pocket Part) 9

Wisc. Stat. Ann. § 267.18 (1967 Pocket Part) 9

OTHER AUTHORITIES:

Annunzio, Testimony to House Subcommittee on Consumer Affairs, Hearing on the Consumer Credit Protection Act (1967) 17

Bare, Testimony to House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967) 12, 16

Brunn, Wage Garnishment in California: A Study and Recommendations, 53 Cal. L. Rev. 1214 (1965) 16

Bureau of Labor Statistics, Fact Sheet No. 4-F, Debt Pooling and Garnishment in Relation to Consumer Indebtedness (1966) 16

Caplovitz, The Poor Pay More (1967 ed.) 23

Comment, Wage Garnishment in Washington—An Empirical Study, 43 Wash. L. Rev. 742 (1968) 10, 12, 15

PAGE

Fisher, How Garnisheed Workers Fare Under Arbitration, Monthly Labor Review (Dept. of Labor, May, 1967) 13

Gonzales, Cong. Rec. (Feb. 1, 1968) 24

Halpern, Cong. Rec. (Feb. 1, 1968) 12

Jablonski, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759 ..... 9, 10, 13, 14

Jackson, Testimony to the House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967) 16

Jacob, Usage of Wage Garnishment and Bankruptcy Proceedings in Four Wisconsin Cities, address delivered to the American Political Science Association, September, 1966 11

Milwaukee Journal, December 10, 1966, § 1, at 17, col. 4 14

National Industrial Conference Board Studies in Personnel Policy, No. 194 (1964) 13

Note, Garnishment in Kentucky—Some Defects, 45 Ky. L. J. 322 (1956) 13

Patterson, Wage Garnishment—An Extraordinary Remedy Run Amuck, 43 Wash. L. Rev. 735 (1968) 14

President Lyndon Johnson, Message to Congress on Poverty, March 14, 1967 10

Report No. 1040, House Committee on Banking and Currency, 90th Cong., 1st Sess. (1967) 16

Report of the Consumer's Advisory Council, New York City Dept. of Consumer Affairs, on the Uniform Consumer Credit Code (Feb. 3, 1969) 13

Report of the National Advisory Commission on Civil Disorders (Bantam ed. 1968) 7, 8

PAGE

Reuss, Cong. Rec. (Feb. 1, 1968) 17

Sullivan, Cong. Rec. (Feb. 1, 1968) 15

Warren and Jordan, The Uniform Consumer Credit Code, 68 Colum. L. Rev. 387 (1968) 25

Wirtz, Testimony to the House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967) 13

Wisconsin Blue Book (1968) 10

SUPREME COURT, U. S.

MAR 8 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 130

CHRISTINE SNIADACH,

Petitioner,

v.

FAMILY FINANCE CORPORATION of Bay View and MILLER HARRIS INSTRUMENT COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

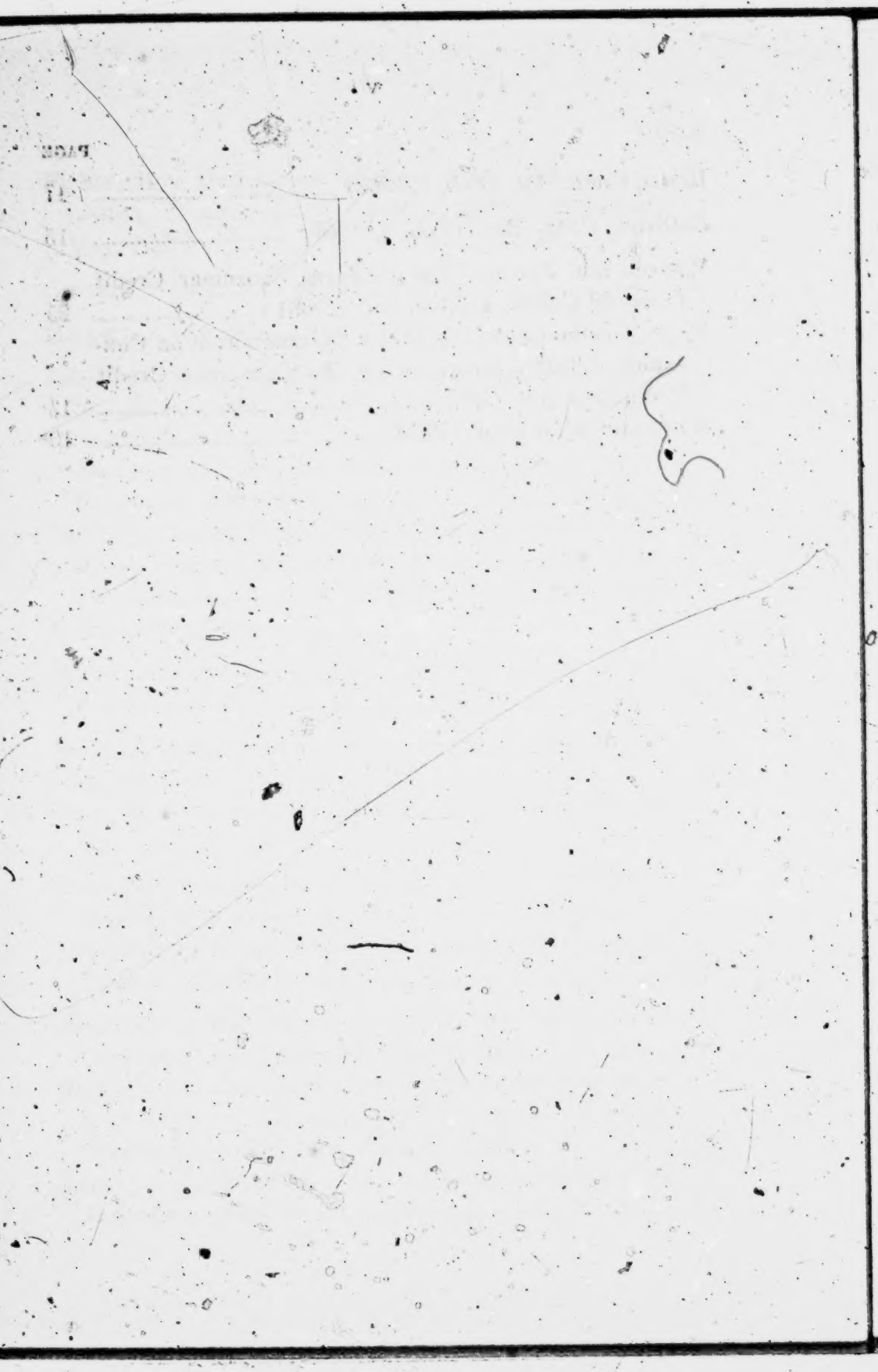
BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
GABRIELLE A. KIRK
PHILIP G. SCHRAG
10 Columbus Circle
New York, New York 10019

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Attorneys for Petitioner

WILLIAM F. YOUNG, JR.
Of Counsel



In the

Supreme Court of the United States

October Term, 1968

No. 130

Christine Sniadach,

Petitioner,

v.

Family Finance Corporation of Bay View and Miller Harris Instrument Company.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR PETITIONER

Opinions Below

The order of the Milwaukee County Court of Wisconsin (R. 118-120; A. 10-11) is unreported. The memorandum decision of the Milwaukee Circuit Court of Wisconsin (R. 101-110; A. 14-23) is also unreported. The decision of the Supreme Court of Wisconsin (R. 126-148; A. 27-51) is reported at 37 Wis.2d 163, 154 N.W.2d 259 (1967).

Jurisdiction

The judgment of the Supreme Court of Wisconsin was entered on December 8, 1967 (A. 26). Rehearing was denied on February 27, 1968 (A. 52). The petition for writ of certiorari, filed May 27, 1968, was granted February 24, 1969 (A. 54). Jurisdiction of this Court rests

on 28 U.S.C. §1257(3), petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.

Question Presented

Petitioner is a $65.00 per week wage earner. Half the wages due her were garnisheed before trial by plaintiff in a lawsuit against her. Under Wisconsin law, before petitioner's wages were garnisheed, she had no right to notice and hearing or other procedure for challenging the legality of the garnishment sought by plaintiff. The plaintiff did not have to show that without garnishment, he would be unlikely to obtain jurisdiction over petitioner or to collect a money judgment, nor did he have to show probable cause to believe that petitioner owed him any money, nor any other reason purporting to justify denial of notice and hearing. Does this procedure deny due process of law secured by the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Wis. Stats. Sections 267.01, 267.02, 267.05, 267.07, 267.13, 267.16, 267.18, 267.20 (1967 Pocket Part). They are set forth in the appendix *infra*, p. 1a.

Statement

Petitioner Christine Sniadach is a wage earner and resident of Milwaukee, Wisconsin. The Family Finance Corporation of Bay View (respondent here), alleging to be her creditor, commenced an action against her for $420.00 in the Wisconsin courts.[1] It also took advantage of the Wisconsin garnishment law, Wis. Stats. Sections 267.01 *et seq.*, to garnishee the wages due her from her employer. All plaintiff did to garnishee petitioner's wages, and all it had to do, was file an attorney's affidavit with the clerk of the County Court, alleging that a summons had been issued in an action by plaintiff against defendant, and that the action was founded upon a promissory note. Wis. Stats. Sections 267.02, 267.04 (A. 5-6). The statute does not require an allegation that the defendant is about to leave the jurisdiction, that an attachment is necessary to obtain jurisdiction, or that but for the garnishment the plaintiff may be unable ultimately to have execution upon a judgment, or any other reason purporting to justify denial of notice and prior hearing. The clerk of the court, on the basis of an attorney's affidavit, ordered petitioner's employer to withhold wages due petitioner.

On November 22, 1966, pursuant to the clerk's summons, petitioner's employer, the Miller Harris Instrument Co., withheld wages due petitioner in the sum of $31.59 and continues to withhold them (A. 7). At no point has petitioner been granted a hearing on whether or not the garnishment was proper, and the statute affords her none until the main action is tried.

---

[1] The claim for $420.00 has not yet been decided because it has been stayed pending the outcome of this proceeding involving Wisconsin's pre-judgment garnishment law.

How the Federal Question Was Raised and Decided Below

Petitioner sought by order to show cause in the County Court to dismiss the garnishment on the ground that the Wisconsin procedure for pre-judgment garnishment deprived her of due process of law under the Fourteenth Amendment to the Federal Constitution. Her attorney alleged that the proceedings were "in violation of defendant's constitutional rights under . . . the United States Constitution, Fourteenth Amendment, in that defendant is being deprived of her property without due process of law." Affidavit of Thomas M. Jacobson, dated December 22, 1966 (A. 9). On January 7, 1967, Judge Thaddeus Pruss of the County Court held that "the garnishment action in the instant proceedings does not violate defendant's constitutional rights under . . . the United States Constitution 14th Amendment due process and equal protection" (A. 10-11).

On appeal to the Circuit Court of Milwaukee, petitioner argued that the garnishment statute "deprives the defendant of due process of law in violation of the fourteenth amendment to the United States Constitution because the defendant is given no hearing before being deprived of his property." The Circuit Court affirmed on March 15, 1967, stating that "[d]efendant's argument rejects the fact that nothing has happened to defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff" (A. 14-23).

In the Supreme Court of Wisconsin, petitioner again argued that the garnishment procedure violated due process of law guaranteed to her by the Fourteenth Amendment to the Federal Constitution. On December 8, 1967,

the Supreme Court of Wisconsin affirmed the decision below holding that "Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law" (A. 27-41). The Court quoted with approval the language of *Byrd* v. *Rector*, 112 W.Va. 192, 163 S.E. 845 (1932):

> [A] defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon . . . Until [a final] judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp . . . A. 35).

Two justices of the Wisconsin Supreme Court dissented, arguing that the reasoning of the majority was "most unrealistic. The constitutional question is not whether defendant has lost his title to the property, nor whether another has gained its beneficial use. The test is whether *he* was deprived of his property" (A. 13) (emphasis in original).

Summary of Argument

Garnisheeing the wages of an alleged debtor, without giving him a prior opportunity to show that no debt is due or that the garnishment is otherwise improper, is contrary to public policy and deprives wage-earners of procedural due process of law secured by the Fourteenth Amendment to the United States Constitution. Prejudgment garnishment is widely used by finance companies and collection attorneys for retail stores to force debtors to

settle claims without litigating their possible defenses to the creditors' suits. Not only are alleged debtors under often irresistible pressures to abandon their right to defend actions, they are forced to pay collection fees and other fees demanded by attorneys for the garnisheeing creditors. Prejudgment garnishments have this powerful effect on wage-earners because many employers are so annoyed by the bookkeeping expenses of garnishments that they fire workers who do not settle with their creditors, and settlement often may be the only way to free the impounded wages. Statutory attempts to remedy these abuses have failed, and garnishments are now the predominant factor in inducing bankruptcies in the United States.

The garnishment of wages without a prior adversary hearing is an unconstitutional denial of due process of law, unless the attachment is necessary to obtain *in rem* jurisdiction or is justified by some other evident emergency. For a hundred years this Court has ruled that under ordinary conditions property may not be taken from a person until an adversary hearing is conducted. The cases cited by the court below are distinguishable as cases involving attachments to obtain *in rem* jurisdiction, and the argument of the court below that a "temporary" deprivation is not a deprivation is, as applied to a man's wages, an unrealistic exaltation of superficial logic over substance.

ARGUMENT

Introduction

A significant minority of our citizens believes that the American system of law and government has not corrected and perhaps cannot correct institutional injustices which tend to disadvantage millions of poverty-stricken families in our otherwise affluent society. At least some of their grievances concern governmental actions that also are inconsistent with constitutional standards declared many years ago. This case involves such a situation:

> Among the most intense grievances underlying the riots of the summer 1967 were those which derived from conflicts between ghetto residents and private parties, principally the white landlord and merchant. Though the legal obstacles are considerable, resourceful and imaginative use of available legal processes could contribute significantly to the alleviation of tensions resulting from these and other conflicts. Moreover, through the adversary process which is at the heart of our judicial system, litigants are afforded meaningful opportunity to influence events which affect them and their community. Report of the President's Advisory Commission (Kerner Committee) on Civil Disorders, 292 (Bantam Ed. 1968).

I.

Prejudgment Garnishment Procedure Is Widely Used to Compel Wage Earners to Make Favorable Settlements With Their Alleged Creditors Without Hearing or Trial.

"Garnishment practices in many states allow creditors to deprive individuals of their wages through court action without hearing or trial. In about 20 states, the wages of an employee can be diverted to a creditor merely upon the latter's deposition, with no advance hearing where the employee can defend himself. He often receives no prior notice of such action and is usually unaware of the law's operation and too poor to hire legal defense." Kerner Report 276. This succinct statement describes the problem in this case.

In a garnishment proceeding before judgment, a creditor or alleged creditor is permitted to cause the wages of his alleged debtor to be turned over to the court or held by the employer pending the outcome of the main litigation between creditor and debtor. In Wisconsin, an alleged creditor may avail himself of this preliminary remedy simply by alleging that the debtor owes him a sum due under a contract. Wis. Stats., Sections 267.02, 267.04, 267.05. He need not allege that the defendant is a non-resident, or has left the jurisdiction, or that an attachment is necessary to obtain jurisdiction, or anything else purporting to justify denying a wage-earner the opportunity to be heard in an adversary proceeding before being deprived of his earnings.

The alleged debtor first hears that his wages have been garnisheed when his employer so informs him,[2] and he

[2] The debtor-defendant need not be notified that his wages have been garnisheed until 10 days after the garnishment. Wis. Stats.

has no opportunity to test the existence of the alleged debt or even the validity of the garnishment[3] until after the main action between the plaintiff and the defendant is tried. Wis. Stats. Section 267.16.

The wages for only one salary period are subject to garnishment, Wis. Stats. Section 276.02, and the defendant is entitled to receive from his employer a "subsistence allowance" of $25 or $40 if he has dependents (in no event to exceed 50% of the wages withheld), but this allowance is fixed at the specified levels regardless of whether the wages garnisheed are those owing for a week or a month, Wis. Stats. Section 267,18, and in any event, is "generally insufficient to support the debtor for any one week." Jablonski, "Wage Garnishment as a Collection Device," 1967 Wis. L. Rev. 759, 767.

Forty-one jurisdictions permit prejudgment garnishment. Some of these states, however, allow its use only as an aid to obtaining *in rem* jurisdiction in cases where it is especially difficult to obtain *in personam* jurisdiction over a defendant. Ohio Rev. Code §2715.11 (defendant must be a non-resident); Gen. Stat. N.C. §1-440.2-3 (defendant must have concealed himself to avoid service); Nev. Rev. Stats. §31.010 (defendant must have absconded). We do not take

---

Section 267.07. Denial of prior notice of an action against him denies a defendant of due process of law under the Fourteenth Amendment. *Windsor* v. *McVeigh*, 93 U.S. 274, 277, 278 (1876). But our argument, *infra*, is directed primarily to denial of the opportunity to be heard, for notice of an action would be of little value if it did not entail the opportunity to participate in some form of adversary hearing. *Hovey* v. *Elliot*, 167 U.S. 409 (1897).

[3] For example, under Wis. Stats. Section 267.02, prejudgment garnishment may be resorted to only in contract actions and some tort actions. But a defendant in some other type of action has no pre-trial forum in which to complain that whatever the merits of the case, prejudgment garnishment is an impermissible preliminary remedy.

issue with the use of prejudgment garnishment statutes which are so limited as to permit the device solely where it is necessary to obtain jurisdiction. But in those states, such as Wisconsin, where wages may routinely be garnisheed with no prior hearing, alleged debtors are unjustly harassed by creditors and collection lawyers who use the device to collect doubtful debts. See Jablonski, "Wage Garnishment as a Collection Device", 1967 Wis. L. Rev. 759 (1967); Comment, "Wage Garnishment in Washington —An Empirical Study", 43 Wash. L. Rev. 742 (1968).

Garnishment as a Weapon for Collection

"Hundreds of workers among the poor lose their jobs or most of their wages each year as a result of garnishment proceedings. In many cases, wages are garnished by unscrupulous merchants and lenders whose practices trap the unwilling workers." President Lyndon Johnson, Message to Congress on Poverty, March 14, 1967. A significant amount of study has been done on the use and effect of garnishment, and the results indicate that the President's message is, if anything, an underestimation of the seriousness of the problem.

During 1968, the wages of more than 20,000 Wisconsin employees were garnisheed before judgment in the five most populous counties.[4] In virtually all these cases, the

[4] Oral inquiries, Feb. 26, 1969, and Feb. 27, 1969, by petitioner's counsel Thomas M. Jacobson of clerks of five counties representing 40% of the State's population. The following figures were reported: Milwaukee Co. (Francis X. McCormick, Clerk): 11,959 garnishments; Dane Co. (Laurie E. Carlson, Clerk): 3,119; Kinosha Co. (Joe Zuffa, Clerk): 2,225; Racine Co. (Edward Daley, Clerk): 1,451 for six months, or approximately 2.900 for all of 1968; Sheboygan Co. (Ray Marquardt, Clerk): 1,234. The population statistics appear in 1968 Wis. Blue Book 593 (1968). The clerks reported that 95%-99% of the garnishments were prior to judgment or hearing.

complaints against the alleged debtors were "small claims," under $500.00.[5] But the nature of the garnishment process is revealed not so much by the number of persons affected as by a description of who uses it, and why. One study focused on the use of garnishment in four Wisconsin cities, and found that garnishment (particularly prejudgment garnishment) is used not only to secure payment of sums legitimately due, but to force alleged debtors to pay without contesting the debts in court.

> In the four cities studied, money lenders (principally finance companies) and retailers were the two heaviest users of wage garnishments . . . Finance companies have the most developed system of collecting delinquent accounts. Within 10 days after a payment is due, they consider the debtor delinquent and begin efforts to collect. They make use of a large repertoire of collection methods including overdue notices, telephone calls to his employer, calls to cosigners of his note (if any), repossession of the article purchased with the loan (if any), and then wage garnishment. . . . When all other means of reaching the debtor have failed, garnishments usually succeed in forcing him to contact the creditor because he finds himself completely out of funds and his job endangered. Many creditors will release the pay check to the debtor after a token payment plus the promise of modest weekly payments until the debt is repaid. The threat of another garnishment is used to force the debtor to complete his payments. H. Jacob, Usage of Wage Garnishment and Bankruptcy Proceedings in Four Wisconsin Cities, address delivered to the American Political Science Association, September, 1966, pp. 7, 10.

---

[5] *Ibid.*

A more recent study by the editors of the University of Washington Law Review revealed an even further abuse prevalent in states permitting routine prejudgment garnishment. The device is used not only to force employees to pay debts without contesting them, but to extort from them additional fees which are paid to the alleged creditors and the collection lawyers. "[C]reditors probably initiate the majority of their justice court suits by a prejudgment garnishment because this form of action, combined with low wage exemptions allowed, often applies sufficient pressure to bring the debtor into the creditor's office to arrange a method of paying the debt. . . . Additional charges, including attorney fees, collection charges, interest and service fees, may be added to the original obligation and demanded from the debtor when he comes to the creditor's office." Comment, "Wage Garnishment in Washington—An Empirical Study", 43 Wash. L. Rev. 742, 752 (1968).

Garnishment is an effective weapon in the arsenal of the collection lawyers and finance companies not only because "the individuals whose wages are being garnished are the very individuals whose total wages are required for the payment of necessary living expenses: food, clothing, shelter, and medical expenses,[6] but also because of the widespread practice among employers of firing workers whose wages are garnisheed. "The debtor often may find himself unemployed; employers are often unwilling to accept the additional expense of administering garnishments." Remarks of Congressman Halpern, Cong. Rec., p. H689 (Feb. 1, 1968). "Some companies regard a single garnishment as grounds for discharge . . . it is de-

[6] Testimony of Clive W. Bare, Referee in Bankruptcy, Eastern District of Tennessee, to House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act (1967).

tested as an unmitigated nuisance by employers to such an extent that even union contracts tacitly or specifically recognize the right of an employer to discharge an employee whose debts result in more than a prescribed number of garnishments within a specified period." Note, Garnishment in Kentucky—Some Defects, 45 Ky. L. J. 322, 330 (1956). See Fisher, How Garnisheed Workers Fare Under Arbitration, Monthly Labor Review (Dept of Labor, May 1967). Between 100,000 and 300,000 American workers are fired from their jobs each year as a result of wage garnishments. Testimony of Secretary Willard Wirtz to the House Subcommittee on Consumer Affairs, Hearings on the Consumer Credit Protection Act, p. 739 (1967). Thirteen percent of American manufacturing firms fire workers whose wages are garnisheed even once. National Industrial Conference Board Studies In Personnel Policy, No. 194, p. 38, Table 40 (1964). A study of garnishments in Wisconsin showed that 41% of employees in the sample were warned of dismissal if they were again garnisheed; 11% were fired forthwith, and in only 15% of the cases did the employers try to help the workers. Jablonski, "Wage Garnishment as a Collection Device," 1967 Wis. L. Rev. 759, 766, n. 29.[7]

---

[7] Section 304 of the Federal Consumer Credit Protection Act prohibits employers from firing workers because of a garnishment "for any one indebtedness." But this section does not and will not solve the problem of firings for garnishment. First, this section of the Act is not effective until July 1, 1970. Second, the section does not prohibit discharge for a second garnishment during the employee's career. And most important, state laws to the same effect (such as McKinney's Cons. Laws of N.Y., C.P.L.R. §5252) have been ineffective. "Since it is nearly impossible for a worker to prove that the garnishment was the cause of his dismissal, employers can usually justify the dismissal of any employee on the grounds of a number of petty infractions of work rules. . . . The only security against firing because of garnishment is abolition of garnishment." Report of the Consumers' Advisory Council, New York City Dept. of Consumer Affairs, on the Uniform Consumer Credit Code, p. 14 (Feb. 3, 1969).

The most gross injustices in cases of discharge as a result of garnishment occur when the garnishments are of the pre-judgment type; there the defendant may have a perfectly good defense to the main lawsuit, or may not even be a debtor, but because he is denied a prior hearing he is threatened with being fired before he can contest the validity of the garnishment. It does not matter to the employer that the worker is innocent—the nuisance to the employer and his bookkeepers is as great. Only by settling immediately with the plaintiff can the employee remove the garnishment and retain his job security.[8]

Under this kind of pressure to avoid continuing garnishment pending extended litigation, it is no surprise that workers obtain money somewhere and settle claims against them, however unjust. Nor is it surprising when a judge of a (Washington) County District Justice Court reports that he recalls "only one case of the 2,600 cases filed in the Everett [County] Court in 1967 in which a defendant went to trial after a prejudgment garnishment." Judge Mark Patterson, "Wage Garnishment—An Extraordinary Remedy Run Amuck", 43 Wash. L. Rev. 735 (1968). Workers subjected to garnishment have no alternative but to pay the amounts claimed; in addition to whatever "collection fees" the creditors' attorneys demand. "The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages

---

[8] Cases have been documented in which employees were fired as soon as their wages were garnisheed, and were able later, at trial, to show that they were not liable. *Milwaukee Journal*, December 10, 1966, §1, at 17, col. 4, cited in Jablonski, *supra*, at 769, n. 42.

back. If the debt is large, he will often sign a new contract or 'payment schedule' which incorporates these additional charges," Comment, "Wage Garnishment in Washington—An Empirical Study", 43 Wash. L. Rev. 742, 753 (1968).

In a significant proportion of the cases, not only the "collection fees" but the underlying debt is subject to a good defense, such as fraud, but the debtor is never able to raise this defense because he cannot afford to wait until trial. "What we know from our study of this problem [in the hearings of the House Subcommittee on Consumer Affairs] is that in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in any easy credit nightmare in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." Remarks of Representative Leonor Sullivan, Chairman of the House Subcommittee on Consumer Affairs, Cong. Rec. p. H688 (Feb. 1, 1968). Garnishment "is mainly the weapon not of the honest merchant or lender but of the predatory credit sellers who hook a poor, ignorant worker on credit terms which are as devastating to that worker as the dope habit—something he can never seem to lick . . . [W]eep for the inhumanity exposed [in our hearings] about the sewer of the so-called easy credit racket—not legitimate business but the blood suckers of commerce." *Ibid.*

Garnishment and Personal Bankruptcies

It has been established beyond doubt that garnishment —and the accompanying threat of loss of employment— is the triggering cause of most bankruptcies in the United

States.[9] Federal bankruptcy referees have found upon examination of creditors and debtors that "between 60 and 70 percent of bankruptcy filings are the direct result of wage garnishments. Many individuals are being driven into bankruptcy who actually owe relatively small sums, but whose wages are under attachment." Testimony of Clive W. Bare, Referee in Bankruptcy, Eastern District of Tennessee, to House Subcommittee on Consumer Affairs, Hearings on Consumer Credit Protection Act, p. 415 (1967). A direct correlation has been found between the harshness of state garnishment laws and the incidence of filings in bankruptcy.[10] Bureau of Labor Statistics, Fact Sheet No. 4-F, Debt Pooling and Garnishment in Relation to Consumer Indebtedness (1966); see Brunn, Wage Garnishment in California: A Study and Recommendations, 53 Cal. L. Rev. 1214 (1965).

In short, the garnishment procedure is a harsh device used largely by finance companies to collect debts without having to submit to a full hearing in court. Garnishments are a great hardship to wage earners, who cannot afford to lose even 10% or 15% of their wages and still maintain their families, and who are threatened in many instances with being fired if they do not settle with their alleged creditors. As one member of the House Commit-

---

[9] In Fiscal 1967, there were 208,329 bankruptcies filed in United States District Courts. Testimony of Royal E. Jackson, Chief, Bankruptcy Division, Administrative Office, U. S. Courts, to the House Subcommittee on Consumer Affairs, p. 416 (1967). 92% of them were filed by consumers rather than businesses. *Ibid.*

[10] "In States such as Pennsylvania and Texas, which prohibit the garnishment of wages, the number of nonbusiness bankruptcies per 100,000 of population are nine and five, respectively, while in those States having relatively harsh garnishment laws, the incidents of personal bankruptcies range between 200 to 300 per 100,000 population." Report No. 1040, House Committee on Banking and Currency, 90th Cong., 1st Sess., p. 21 (1967).

tee on Banking and Currency has stated, "[G]arnishment is an expensive, painful procedure which can cost a man's job. This has come to the attention of this Committee as well as many other Members of Congress. The reports on the riots in Watts, Chicago and other cities, indicate that it costs people their lives." Congressman Frank Annunzio, in House Subcommittee on Consumer Affairs Hearings on Consumer Credit Protection Act, p. 104 (1967). And prejudgment garnishment, by which perfectly innocent employees can be subjected to all the pains and penalties of wage attachments before they are given a chance to say a single word in their own defense, is the harshest type of garnishment. As a Wisconsin Congressman has stated, "The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level." Remarks of Congressman Henry Reuss, Cong. Rec., p. H688 (1968).

But prejudgment garnishment is not only an "inhuman doctrine"; petitioner submits that it is also an unconstitutional deprivation of due process of law secured by the Fourteenth Amendment.

II.

The Use of Prejudgment Wage Garnishment When It Is Not Needed to Obtain *In Rem* Jurisdiction Deprives Employees of Due Process of Law.

We do not assert that garnishment after judgment is unconstitutional, for there the defendant has had an opportunity to raise his claims and defenses in an appropriate adjudicative proceeding. Nor do we claim that prejudgment garnishment is invalid in the rare case where it is necessary to obtain *in rem* jurisdiction in an action where the defendant is not in the state or is for some other reason not within the jurisdiction of the court. We do assert that the deprivation of a man's wages without a prior adversary hearing, unless justified by some evident emergency, is a violation of his rights under the Fourteenth Amendment.

We start with the proposition that no one may be deprived of property by state action unless first given notice and an opportunity to be heard. For example, this Court has struck down a Florida procedure whereby the judgment creditor of a corporation could issue an execution against the property of the owner of unpaid stock, without giving that owner notice or a prior hearing. The owner was held to be "entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1915). Absent a prior hearing, the attachment was "repugnant to the 'due process of law' provision of the 14th Amendment, which requires at least a hearing, or an opportunity to

be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation . . ." *Ibid.*

The right to be heard in an adversary proceeding before a deprivation of property is one of the essential features of the American legal process. As Mr. Justice Frankfurter said in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 164 (1951), notice and hearing are "prerequisite to due process in civil proceedings." As recently as *Schroeder* v. *New York,* 371 U.S. 208, 212 (1962), this Court has held the right to be heard in civil litigation to be "one of the most fundamental requisites of due process," and has even deemed it to be "the fundamental requisite" of due process, *Grannis* v. *Ordean,* 234 U.S. 385, 394 (1914). See also, *Londoner* v. *Denver,* 210 U.S. 373 (1908); *Morgan* v. *United States,* 304 U.S. 1 (1938); *Southern Ry. Co.* v. *Virginia,* 290 U.S. 190 (1933); *Kelly* v. *Wyman,* —— F. Supp. ——, 37 U.S.L. Week 2324 (S.D. N.Y. 1968) (3-judge court).

The importance of the right to be heard has been explained by this Court in another context: if there is no right, before a deprivation of property, "to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy," there arises the danger of an "arbitrary and baseless" conclusion. *Southern Ry. Co.* v. *Virginia,* 290 U.S. 190, 195-96. There the Court was concerned with a delegation of decision-making power to an administrative agency, which acted without hearing. Here the power to order a garnishment without hearing is given to the Clerk of the County Court, who issues the order perfunctorily; in fact, the statute empowers him to issue signed, sealed, garnishment summoneses *in blank* to creditors' attorneys, upon payment of the required fee. Wis.

Stats. Section 267.04(1). The decisive power in reality remains with the creditor's attorney. Not even an official administrative agency, as in *Southern Ry. Co.*, protects the defendant from an arbitrary deprivation.

We have, therefore, in the Wisconsin procedure, the practice of denying wage-earners the sums due them, without either any prior adversary process or a special justification for summary procedure. The only way in which the Wisconsin Supreme Court was able to hold such a procedure constitutional was to hold that a "temporary deprivation" of property is not a "deprivation" of property. In support of this proposition, it cited three Supreme Court decisions. But it may be seen that these decisions, none of which involved the attachment or garnishment of wages, are more properly viewed as cases dealing with special jurisdictional justifications for prejudgment attachment, and that the due process clause of the Constitution is concerned with realities and not with word-play. The first case cited in the opinion of the Wisconsin Supreme Court is *Ownbey* v. *Morgan*, 256 U.S. 94 (1921). But there the defendant resided in a foreign state. This Court justified the prejudgment attachment on this basis:

> Hence it naturally came about that the American colonies and states, in adopting foreign attachment as a remedy for collecting debts due from *nonresident or absconding debtors*, in many instances made it a part of the procedure that if the defendant desired to enter an appearance and contest plaintiff's demand, he must first give substantial security . . . A property owner *who absents himself from the territorial jurisdiction of a state*, leaving his property within it, must be deemed ex necessitante to consent that the state may subject such property to judicial process or to answer demands made against him in his absence,

according to any practicable method that reasonably may be adopted. 256 U.S. at 105-111 (emphasis added).[11]

Coffin Brothers v. *Bennett*, 277 U.S. 29 (1928), is likewise no authority for the opinion of the Wisconsin Supreme Court. Justice Holmes, writing for the Court, approved a Georgia procedure for the attachment of the stock of liquidated banks. The stock could be attached prior to any hearing on the propriety of the attachment, even though the stockholders were domestic residents. But the opinion of the Georgia Supreme Court makes clear that attachment in such cases had a very special purpose: the attachment was necessary in order for plaintiffs to obtain jurisdiction over defendants.[12] See also *Harris* v. *Balk*, 198 U.S. 215 (1905). But plaintiff in the instant case did not need to garnishee defendant's wages to obtain jurisdiction over her; he had *in personam* jurisdiction.[13]

---

[11] Other language in the *Ownbey* case indicates that this Court could not have intended that the principle it was adopting with regard to foreign debtors should apply to wage garnishments even of foreign wage earners. The Court used the term "property" not in its legal sense but in the ordinary sense of "substantial wealth":

> Ordinarily [the requirement that a debtor post bond to dissolve an attachment] is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation must be regarded as a permissible condition. 256 U.S. at 111.

[12] "[The statute] does not provide for rendition of judgments *in personam* against the stockholders of banks which the superintendent of banks has taken control of for the purpose of liquidation, but provides only for summary issuance of executions against stockholders of such banks, as a mode only of commencing against them suits . . ." 164 Ga. 350, 138 S.E. 670, 671 (1927).

[13] Indeed, it is somewhat hard to discern what legitimate purpose underlay plaintiff's decision to garnishee petitioner's wages. It did not need the garnishment for jurisdictional purposes, and petitioner was a domestic resident with roots in the community,

The final authority relied upon by the majority below is *McKay* v. *McInnes*, 279 U.S. 820 (1928), a memorandum decision affirming *McInnes* v. *McKay*, 127 Me. 110, 141 A. 699 (1928), holding Maine's attachment before judgment statute not unconstitutional. The significance of *McKay*, as applied to the present case, however, must be open to some question. *McKay* was submitted on agreed facts to the Maine Supreme Court, and it nowhere appeared whether or not the defendant was a resident of Maine. This Court's citation of *Ownbey* as authority for its affirmance, and its failure to write an opinion, suggests that the Court may have thought that the facts underlying *McKay* were essentially the same as those underlying *Ownbey*. But in the present case, the Court is presented for the first time with the question of the validity of a prejudgment attachment (in this case a wage garnishment) on the basis of a record showing that the defendant's residence and place of employment were within the jurisdiction in which the plaintiff brought his suit, and there is therefore little or no justification for depriving the defendant of his property without any opportunity for a prior hearing.

Futhermore, the applicability to this case of precedents dating even from the 1920's must be subject to some question. The precedents cited by the Wisconsin Supreme Court were suited to borrowers and lenders of substantial wealth. Debtors who had one bank account attached were likely to have others on which they could draw, or other sources of capital; an attchment did not deprive them of their only source of income. Only since the end of World

---

including local employment. The amount of the garnishment was only $31.59, which in any event could not afford the plaintiff much security on his alleged $420.00 debt, particularly in view of the fact that Wisconsin law permits an alleged creditor to garnishee wages for one pay period only. Wis. Stats. §267.02(b)(2).

War II has America become a consumer credit economy, in which, quite acceptably, wage-earners are regularly in debt. The outstanding installment debt has grown from 2.5 billion dollars in 1945 to 75 billion dollars in 1967, and will exceed 100 billion dollars by 1970. Caplovitz, *The Poor Pay More,* xvi (Preface to 1967 edition). Petitioner submits that the mechanical application to garnishments in the 1960's of rules of law formulated to govern attachments in the 1920's cannot be justified, even were it not for the fact that the 40 year old cases are all distinguishable.

The remaining argument, then, supporting the validity of the garnishment is that employees whose wages are garnisheed are not "deprived" of their property because the "deprivation" is merely temporary; the wages are held in escrow until the plaintiff's main case is tried, and if the plaintiff is not successful, the garnishment is dissolved.[14]

---

[14] This reasoning was relied upon by two supreme courts besides that of Wisconsin, although Wisconsin's is the only Supreme Court to apply it to wage garnishment. The Supreme Court of West Virginia has reasoned:

> The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. [Until final judgment] there has been no deprivation of property . . . Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp. Under no circumstances could it be converted into cash and applied to the plaintiff's demand prior to final adjudication of the merits of the controversy between plaintiff and defendant. *Byrd* v. *Rector,* 112 W.Va. 192, 163 S.E. 845 (1932).

And the Supreme Court of Maine, while conceding that "Deprivation does not require actual physical taking of the property or thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will are affected," upheld prejudgment attachment by adding "yet conditional and temporary it is." *McInnes* v. *McKay,* 127 Me. 110, 116, 141 A. 699, 702 (1928).

But the due process clause of the Fourteenth Amendment addresses itself not to "drily logical" analysis or "scholastic interpretation," see *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110 (1911), but to realities. And nothing is more real to a wage earner whose wages have been garnisheed than impairment of his ability to care for his family and meet the demands of his other creditors. It matters little that the plaintiff has no use of the defendant's wages; the important fact is that the defendant has no use of them. And, unlike attachment of stock or other assets of a wealthy man, loss of wages to a wage earner is likely to result in a financial squeeze seriously affecting his power to feed, clothe and shelter his dependents.[15] Nor is the "temporary" nature of the deprivation a satisfactory response; given the time required for discovery and the crowded condition of court dockets, it may be years before the main action comes to trial. During this period, the wage earner loses the difference—measurable as interest—between the present and future value of the wages due him. More important, the garnishment, valid or not, keeps a defendant under pressure to settle the lawsuit on terms favorable to the alleged creditors, even if he has a perfect defense. It is no comfort to a wage earner that, like any attachment, a garnishment "does not destroy title or the right to sell. Until a sale of execution, the debtor has full power to sell or dispose of the property attached without disturbing the possession (in case of personalty) or rights acquired by the attachment." *McInnes* v. *McKay*, 127 Me. 110, 115, 141 A. 699,

[15] "For a poor man—and whoever heard of the wages of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy, and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense in such a process?" Remarks of Congressman Gonzales, Cong. Rec. p. H690 (Feb. 1, 1968).

702 (1928). Even in jurisdictions which do not forbid wage assignments, there is no real market for wages currently attached, which the alleged debtor may never become entitled to. The Wisconsin Supreme Court's conception of what constitutes a "deprivation" of property is archaic and unrealistic, ignoring the difference in value between a sum of money and the right to future possession of that sum. It prevents thousands of wage earners each year from receiving the fair play to which our legal system entitles them.

CONCLUSION

"[N]ational, state and local governmental policies promote the training and equipping of people to obtain and hold jobs so that they can support their families as productive members of society and not increase the huge welfare burden that the taxpayer now bears. Much of the structure of our present creditors' remedies laws is inconsistent with this objective. . . . Garnishment laws that allow creditors to tie up income necessary to support the debtor's family—often even before an adjudication of the debtor's rights—and to interfere with the debtor's employment relationship are inimical to prevailing governmental policy." Warren and Jordan, "The Uniform Consumer Credit Code", 68 Colum. L. Rev. 387, 438 (1968).

In this instance, settled principles of constitutional law require a remedy for the evil. The judgment below should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
GABRIELLE A. KIRK
PHILIP G. SCHRAG
10 Columbus Circle
New York, New York 10019

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Attorneys for Petitioner

WILLIAM F. YOUNG, JR.
Of Counsel

APPENDIX

APPENDIX

Statutory Provisions Involved

This case involves the following statutes of the State of Wisconsin:

(a) Wis. Stat. §267.01 (1967 Pocket Part)

(1) Any creditor may proceed against any person who is indebted to or has any property in his possession or under his control belonging to such creditor's debtor, as prescribed in this chapter. "Plaintiff" as used in this chapter includes a judgment creditor and "defendant", a judgment debtor.

(2) Except as otherwise provided in this chapter, the procedure in garnishment actions shall be the same as in ordinary civil actions.

(2a) A garnishment action is a separate action.

(3) An individual may commence a garnishment action in his own person and in his own behalf, or by an attorney licensed to practice in the courts of this state, but not otherwise. Garnishment actions on behalf of any other party shall be commenced only by attorneys licensed to practice in the courts of this state.

(4) No garnishment action shall be brought to recover the price or value of spirituous, malt, ardent or intoxicating liquors sold at retail.

(b) Wis. Stat. §267.02 (1967 Pocket Part)

(1) A plaintiff may commence a garnishment action at any time after:

Statutory Provisions Involved

(a) A summons is issued: 1. In an action for damages founded upon contract, express or implied (or in a contract action where a writ of attachment could issue on demands not yet due under s. 266.03(3)). 2. In an action upon a judgment. 3. In a tort action where a writ of attachment could issue under s. 266.03(2).

(b) An execution upon an in personam judgment is issuable.

(2) If wages or salary are the subject of a garnishment action, and payment of wages or salary to the defendant is, has been, or should be, withheld therein, plaintiff may not commence any other garnishment action affecting the wages or salary of the principal defendant prior to judgment in the principal action.

(3) Except as provided in sub. (2), the plaintiff may, in like manner, subsequently proceed against other garnishees, or, if he has reason to believe they have subsequently become liable, against the same garnishee.

(c) Wis. Stat. §267.04 (1967 Pocket Part)

(1) Upon payment to the clerk of a clerk's fee of $2 and a suit tax of $1, the clerk shall issue a garnishee summons together with sufficient copies to the plaintiff or his attorney; the summons form may be in blank, but must carry the court seal.

(c) Wis. Stat. §267.05 (1967 Pocket Part)

(1) The garnishee complaint in a garnishment action before judgment must allege the existence of one

of the grounds for garnishment mentioned in s. 267.02(1)(a), the amount of the plaintiff's claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is, to the best of plaintiff's knowledge and belief, not exempt from execution.

(d) Wis. Stat. §267.07 (1967 Pocket Part)

(1) Except as provided in s. 267.05(4), the garnishee summons and complaint shall be served on the garnishee as required for the exercise of personal jurisdiction under ch. 262, and notice of such service in susbtantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal defendant as required for the exercise of personal jurisdiction under ch. 262, not later than 10 days after service on the garnishee as provided in s. 262.06.

(e) Wis. Stat. §267.13 (1967 Pocket Part)

(1) If the answer shows a debt due to the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, as stated in the garnishee complaint, with interest and costs, to the clerk of the court. If prior to so doing, the plaintiff in writing requests the garnishee to pay such sum to such clerk, the garnishee shall, within 5 days after receipt of such request, pay the sum to the clerk. The clerk shall give his receipt therefor to the

garnishee. Such payment shall discharge the garnishee of all liability for the amount so paid.

(2) If the debt disclosed is not due, this section shall apply when it becomes due, with like effect.

(3) If the garnishee fails to pay such sum within 5 days after receipt of such request, the plaintiff shall be entitled to judgment against the garnishee for the amount disclosed, when due, either before or after judgment in the original action and may collect the same by execution; but in case no judgment has been rendered in the principal action the execution against the garnishee shall require the sheriff to pay the money collected into court to abide the event of the principal action. Moneys paid into court shall be paid to the plaintiff when final judgment is rendered in his favor, and to the extent of satisfying the same, upon order of the court, and any balance to the party entitled thereto.

(4) If no such request is made and the garnishee does not elect to pay such sum to the clerk, the garnishee shall hold the same until order of the court. No stipulation between the plaintiff and the defendant shall be honored by the garnishee, until signed and approved by the court.

(5) If judgment is against the plaintiff such moneys shall be paid to the defendant.

(f) Wis. Stat. §267.16 (1967 Pocket Part)

(1) No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs.

(2) The court may adjudge the recovery of any debt, the conveyance, transfer or delivery to the sheriff or any officer appointed by the judgment of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand; or by the judgment pass the title thereto; and may therein or by its order direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid or delivered to the clerk or officer. The judgment against a garnishee shall discharge him from all demands by the defendant for all property paid, delivered or accounted for by the garnishee, by force of such judgment.

(g) Wis. Stat. §267.18 (1967 Pocket Part)

(1) From the time of the service of the summons and complaint upon the garnishee he shall stand liable to the plaintiff for the property then in his possession or under his control belonging to the defendant or in which he is interested to the extent of his right or interest therein and for all his debts due or to become due to the defendant, except such as are exempt from execution, but not in excess of the amount of the plaintiff's claims as disclosed by his garnishee complaint together with 25 per cent of the amount claimed in the garnishee complaint but not less than $25 nor more than $500 to secure costs.

(2) (a) When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without

dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

(b) If the court determines that the principal defendant is entitled to an exemption in excess of the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be set off and applied against said exemption. If the court determines that the principal defendant is entitled to an exemption less than the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be the exemption to which the principal defendant is entitled in such garnishment action.

(h) Wis. Stat. 267.20 (1967 Pocket Part)

Except upon the order of a judge no action shall be commenced by the defendant or his assignee against a garnishee upon any garnished claim or demand or to recover any property garnished, or execution be issued upon a judgment in favor of defendant against such garnishee, until the termination of the garnishment; and if an action has been commenced or an execution issued it shall be stayed by the court or a judge thereof as to the garnishee upon his application.

SUPREME COURT, U. S.

APR 11 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 130

CHRISTINE SNIADACH,

Petitioner,

—v.—

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF CONSUMERS UNION OF UNITED STATES, INC., *AMICUS CURIAE*

KARPATKIN, OHRENSTEIN & KARPATKIN
660 Madison Avenue
New York, New York 10021
Attorneys for Amicus Curiae

Of Counsel:
RHODA H. KARPATKIN
MARVIN M. KARPATKIN
BURT NEUBORNE

INDEX

PAGE

Interest of Amicus 1

ARGUMENT:

POINT I

Pre-judgment wage garnishment is part of a network of oppressive credit practices which prey on the poor consumer 4

POINT II

Wisconsin's pre-judgment wage garnishment procedure violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment 9

A. Pre-Judgment Wage Garnishment Violates the Equal Protection Clause 9

1. The historical function of pre-judgment garnishment and its present anachronistic status 9

2. The current oppressive function of pre-judgment wage garnishment effects a denial of equal access to the courts 12

B. Pre-Judgment Wage Garnishment Violates the Due Process Clause 17

CONCLUSION 20

Authorities Cited

PAGE

Cases:

Anders v. California, 386 U.S. 738 (1967) 15

Bowser v. Collins, 22 Edw. 4, Y.B. (1483) 9
Burns v. Ohio, 360 U.S. 252 (1959) 15
Bush v. Texas, 372 U.S. 586 (1963) 5

Coffin Brothers v. Bennett, 277 U.S. 29 (1928) 17

Douglas v. California, 372 U.S. 353 (1963) 5, 15
Draper v. Washington, 372 U.S. 487 (1963) 5
Dwy v. Connecticut Co., 89 Conn. 74 (1915) 17

Edwards v. California, 314 U.S. 160 (1941) 13, 14

Gideon v. Wainwright, 372 U.S. 335 (1963) 5, 15, 16
Griffin v. Illinois, 351 U.S. 12 (1956) 5, 13, 14, 15, 16, 18

Harper v. Virginia Board of Electors, 383 U.S. 663 (1966) 16

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 11

Lane v. Brown, 372 U.S. 477 (1963) 5
Lynumn v. Illinois, 372 U.S. 528 (1963) 5

McInnes v. McKay, 279 U.S. 820 (1928) 17
Miranda v. Arizona, 384 U.S. 436 (1966) 5
Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950) 17, 18

PAGE

Ownbey v. Morgan, 256 U.S. 94 (1921) 10, 11, 17

Pennoyer v. Neff, 95 U.S. 714 (1877) 10

Roberts v. LaVallee, 389 U.S. 40 (1967) 16

Simmons v. Housing Authority of West Haven, No. 909, certiorari granted April 7, 1969 ..... 6, 16

Smith v. Bennett, 365 U.S. 708 (1961) 15

Williams v. Shaffer, 385 U.S. 1037 (1967) 5, 6, 16

Constitutional Provisions:

United States Constitution
Fourteenth Amendment 9, 13

Statutes:

Wisconsin Statutes Annotated

§262.05 11

§262.06 11

§§267.01 et seq. 4

Other Authorities:

"Are Changes Coming in Those One-Sided Credit Laws?" 31 CONSUMER REPORTS 112 8

"Bait the Hook with Merchandise," 30 CONSUMER REPORTS, 461 (September 1965) 6

Brunn, *Wage Garnishment in California*, 53 Calif. L. Rev. 1214 (1965) 12, 19

PAGE

Cardozo, *The Nature of the Judicial Process*, 151 (Yale Paperbound ed. 1960) 17

Carrington, *The Modern Utility of Quasi-in-Rem Jurisdiction*, 76 Harv. L. Rev. 303 (1962) 11

Cleary and Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 N.W. L. Rev. 599 (1955) 11

Comment, *Wage Garnishment in Washington—an Empirical Study*, 43 Wash. L. Rev. 742 (1968) 12

Covrnos, *A Modern Plutarch*, p. 27 5

Developments in the Law-State-Court Jurisdiction, 73 Harv. L. Rev. 909 (1960) 11

2 Drake, Suits by Attachment 699 (2d Ed. 1858) 9

Fortas, "Equal Rights—For Whom?" 42 N.Y.U. L. Rev. 401 (1967) 5

Hamilton, *The Greek Way* 181 (Time Inc. Ed. 1963) 4

2 Holdsworth, *A History of English Law* 387 (3d Ed. 1923) 9

Jabonski, *Wage Garnishment as a Collection Device*, 1967 Wisc. L. Rev. 759 (1967) 12

Morris, *Select Cases of the Mayor's Court of New York City 1674-1784*, Introduction, 14 (1935) 9

Mussman and Riesenfeld, *Garnishment and Bankruptcy*, 27 Minn. L. Rev. 1 (1942) 9-10

Patterson, *Wage Garnishment—an Extraordinary Remedy Run Amuck*, 43 Wash. L. Rev. 735 (1968) 12

PAGE

Note, *Personal Jurisdiction Over Non-Residents,* 1962 Wisc. L. Rev. 544 (1962) 11

Report of the President's Advisory Commission on Civil Disorders (Kerner Commission) 292 (Bantam Ed. 1968) 8

Stephen, *Variations in the Punishment of Crime,* 17 The Nineteenth Century, 755 (1885) 5

"The Truth About Credit Is Coming" 33 CONSUMER REPORTS, 428 (August 1968) 2, 7, 19

Thucydides, *History of the Peloponnesian War,* V, 84 ff. 4

Wright, "The Courts Have Failed the Poor," The New York Times Magazine, March 9, 1969, p. 26 ..... 4, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 130

CHRISTINE SNIADACH,

Petitioner,

—v.—

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF CONSUMERS UNION OF UNITED STATES, INC., *AMICUS CURIAE*

Interest of *Amicus**

Amicus was chartered in the State of New York in 1936 pursuant to the Membership Corporations Law. It is a non-profit organization which performs tests on consumer products and provides information and advice relating to consumer goods and services. *Amicus* publishes and sells the monthly magazine CONSUMER REPORTS. Its current circulation is approximately 1,500,000.

In addition to testing and reporting services, Consumers Union is concerned with the implementation of the following objectives, which are excerpted from its Certificate

* Written consents by the attorneys for both parties have been filed with the Clerk.

of Incorporation, and digested in the masthead of each issue of CONSUMER REPORTS:

> "To obtain and provide for consumers information and counsel on consumers' goods and services covering quality, price, and labor conditions under which such goods are produced and distributed; to give information and assistance on all matters relating to the expenditure of earnings and the family income; to initiate, to cooperate with, and to aid individual and group efforts of whatever nature and description seeking to create and maintain decent living standards for ultimate consumers . . ."

Amicus has published numerous articles and comments which bear upon the issues in this case. *Amicus* has frequently published material concerning consumer credit problems throughout the United States; and, in particular, the problems of wage garnishment and the low-income consumer. Recently, the August 1968 issue of CONSUMER REPORTS contained an article entitled "The Truth About Credit Is Coming", which discusses the newly enacted Consumer Credit Protection Act, which becomes effective July 1, 1969, and, specifically, wage garnishment.

Amicus files this brief because it believes that this case presents important questions of law and policy affecting directly the rights of the consumer, especially the poor consumer, to equal protection of the laws and to due process of law. This country has experienced a veritable economic revolution in credit practices affecting the poor and low-income wage earners. Millions of such consumers, seduced by a combination of the hard sell of consumer goods and promises of easy credit, are now burdened with extensive debts, often beyond their economic capacity. Existing laws, previously appropriate to resolve legal

disputes between commercial equals, have assumed the dimensions of weapons of oppression by creditors against desperate debtors, including debtors who have defenses or counterclaims arising out of shoddy merchandise or shady credit practices.

Such a law is Wisconsin's prejudgment garnishment statute, which traps an already disadvantaged consumer into a position where, prior to adjudication of any debt, he is so financially strangled that he must pay the amount demanded by the creditor and eschew use of the court for his defense or counterclaims.

The extent to which our laws can provide justice for an enormous and expanding number of disadvantaged consumers has been a question which has preoccupied not only jurists, but the leaders of our cities and nation as well. If constitutional guarantees of equal protection and due process can effectively protect the few dollars of small wage earners from premature detention by creditors who have not established their claims, then one more roadblock to justice for the poor will have been eliminated.

ARGUMENT

POINT I

Pre-judgment wage garnishment is part of a network of oppressive credit practices which prey on the poor consumer.

"The law and the courts have failed the inner-city poor" in myriad respects, according to United States Court of Appeals Judge J. Skelly Wright. Wage garnishment is one of the most grievous of its failures.[1] Indeed, it has been termed a process tantamount to a modern debtor's jail.

The process of pre-judgment garnishment of wages in Wisconsin[2] bears ugly witness that often:

> "right . . . is only in question for equals in power; the strong do what they can, and the weak suffer what they must."[3]

But, if there has been one principle which has guided this Court in recent years, it is the proposition that Thucyd-

---

[1] Wright, "The Courts Have Failed the Poor," The New York Times Magazine, March 9, 1969, p. 26.

[2] Wisconsin's pre-judgment garnishment law permits a creditor to garnish an alleged debtor's wages by filing an attorney's affidavit with the court clerk alleging that a summons has been issued against the alleged debtor. The clerk thereupon issues the garnishment order. No notice of the garnishment is given the alleged debtor. The alleged debtor has no opportunity to contest the existence of the alleged debt or to test the propriety of the garnishment itself until the main action is tried. See Wisc. Stats. Ann. §§ 267.01 *et seq.*

[3] Thucydides, *History of the Peloponnesian War,* V, 84 ff. The phrase has also been translated:

> "Justice is attained only when both sides are equal. The powerful exact what they can and the weak yield what they must." Hamilton, *The Greek Way* 181 (Time Inc. Ed. 1963).

ides was wrong, and that "equal justice under law" means something better than Anatole France's bitter observation.[4] To that end this Court has striven to give meaning to the concept that all men, regardless of race or economic status, are equal before the law. See, e.g., Fortas, "Equal Rights—For Whom?" 42 N.Y.U. L. Rev. 401 (1967).

Nowhere has the effort of this Court to prevent law from becoming a machine for condemning the poor to "suffer what they must" been more spectacular than in the assault upon the inequities which traditionally have been visited upon indigent criminal defendants.[5] In a series of historic decisions, this Court has consistently attempted to provide the poor with equal access to criminal justice. See, e.g., *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Douglas* v. *California,* 372 U.S. 353 (1963); *Lane* v. *Brown,* 372 U.S. 477 (1963); *Draper* v. *Washington,* 372 U.S. 487 (1963); *Lynumn* v. *Illinois,* 372 U.S. 528 (1963); *Bush* v. *Texas,* 372 U.S. 586 (1963); *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

But the search for equal justice under law cannot stop at the criminal courthouse door. As Mr. Justice Douglas wrote, dissenting from the denial of certiorari in *Williams* v. *Shaffer,* 385 U.S. 1037 (1967):

> "We have recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judicial relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth

---

[4] ". . . the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." John Cournos, *A Modern Plutarch,* p. 27.

[5] See, generally, Stephen, *Variations in the Punishment of Crime,* 17 The Nineteenth Century, 755, 756 (1885).

> Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters." 385 U.S. at 1039.*

Millions of Americans are confronted, in a civil context, with legal rules and procedures which deny them the basic elements of due process of law and of the equal protection of the laws and, thereby, pervert the process of law from a search for justice into an exercise of power.

Amicus, as an organization concerned with consumer problems, has on many occasions written concerning, and spoken in behalf of, the poor and low income consumer. It has warned of the disastrous social and economic consequences of America's consumer credit orgy.

> "Here is a social and moral problem of perhaps more significance than the economic hazards attending consumer credit. What is called for is not such a passing concern as the stock market decline provided, but a serious and careful investigation at the highest Federal level into the human as well as the financial, the ethical as well as the economic, aspects of this credit game in which the cards are so heavily stacked by the strong against the weak, by the cunning against the trusting."
>
> "Bait the Hook with Merchandise", 30 CONSUMER REPORTS, 461 (September 1965).

This problem has been described by *amicus*:

> "No amount of information will be enough to help millions of consumers escape the toils of endless debt

---

* The Chief Justice concurred in Mr. Justice Douglas' opinion, and Mr. Justice Brennan was also of the opinion that certiorari should be granted. This Court granted certiorari in *Simmons* v. *Housing Authority of West Haven*, No. 909, on April 7, 1969. In both *Williams* v. *Shaffer* and *Simmons* v. *Housing Authority*, the petitioners challenged constitutionality of a procedure which requires an evicted tenant to post a bond prior to contesting the legality of the eviction.

> and the total impoverishment, harassment by creditors, despair, disgrace and personal bankruptcy attending it. Most of those consumers are counted among the poor and uneducated. They are preyed upon by a certain class of credit merchants who beckon day and night from their slum stores with television sets, furniture, clothing and jewelry on easy terms of only a few dollars a week. Slum credit-merchants make at least 90 per cent of their sales on the installment plan, a Federal Trade Commission survey in Washington, D.C., shows. The prices they charge, well concealed in their 'easy payments,' are often exorbitant. A television set generally available for $129.95 sold in a low-income Washington neighborhood for $219.95. A dryer selling elsewhere for $150 was bringing $300 in the poor neighborhood." "The Truth About Credit Is Coming," 33 CONSUMER REPORTS 428, 430 (August 1968).

The role of law and the courts in this bleak overview, as "oppressive rather than redemptive" has been graphically described by Judge Wright:

> "The lawsuits in which people lose their cars, their furniture and their money and have deficiency judgments taken against them are not likely to come to trial. The overwhelming majority of merchant-initiated suits—97 per cent in the case of Harlem merchants—end in a default judgment for the plaintiff because the defendant never appears or answers the summons or complaint."

Wright, "The Courts Have Failed the Poor", New York Times Magazine, March 9, 1969, pp. 26, 104.

Against such a backdrop, pre-judgment garnishment can be seen in appropriate perspective:

> "The process of wage garnishment has been termed 'a modern parallel to debtors' prison.' And it is, in

many ways, not only as iniquitous, but also as ridiculous and self-defeating as the debtors' prisons were. The employe whose salary is being garnisheed is not simply going to be taking home less money; he is also likely to find himself without a job. This is because employers find the procedure of withholding employes' wages such a bother that many simply fire the employes. Just as the debtor in prison is not going to be able to pay his debts, neither will the unemployed indigent subject to garnishment be able to get and hold a job. Unless he can discharge his debts in bankruptcy—and for a number of reasons this may be impossible—his salary will again be garnisheed if he finds other employment. Again the oppressive pattern of joblessness and relief." (*Id.* at 106).

Judge Wright calls for a ban on pre-judgment garnishment. Consumers Union did so in March 1966. "Are Changes Coming in Those One-Sided Credit Laws?" 31 CONSUMER REPORTS 112.

This Court has forged the way in defining racial due process and criminal due process. The same principles which propelled those historic steps towards equal justice under law underscore the present need for a new definition of due process for low-income consumers as well.[7] See *Report of the President's Advisory Commission on Civil Disorders* (Kerner Commission) 292 (Bantam Ed. 1968). It is respectfully submitted that this Court could find no more fitting starting point than by consigning Wisconsin's prejudgment wage garnishment procedure to a deserved oblivion.

---

[7] "The point is simply that a law may be consistently and evenly applied, yet systematically work a hardship on a particular class. In our society, the law has worked a hardship on those least able to withstand it." Wright, "The Courts Have Failed the Poor", *supra* at 26.

POINT II

Wisconsin's pre-judgment wage garnishment procedure violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.

A. *Pre-Judgment Wage Garnishment Violates the Equal Protection Clause*

1. The historical function of pre-judgment garnishment and its present anachronistic status

The historical function of pre-judgment garnishment[8] —as a species of pre-judgment attachment—was the creation of *quasi in rem* jurisdiction over nonresident defendants who could not otherwise be brought within the jurisdiction of the court. Pre-judgment garnishment appeared for the first time in the customs of the medieval borough courts of England. It permitted an English merchant who wished to sue a nonresident defendant (who was usually a foreign merchant) to attach the defendant's property situated within the borough court's jurisdiction and literally hold it for ransom to compel the foreign merchant to appear personally. 2 Holdsworth, *A History of English Law* 387 (3d Ed. 1923); Morris, *Select Cases of the Mayor's Court of New York City 1674-1784*, Introduction, 14 (1935); *Bowser* v. *Collins*, Y.B. (1483), 22 Edw. 4, 30 (Norman-French original), reprinted in translation 2 Drake, *Suits by Attachment* 699 (2d Ed. 1858).

The practice of utilizing pre-judgment attachment and garnishment as a convenient device to create extra-territorial jurisdiction was soon transplanted to the American colonies. See, generally, Mussman and Riesenfeld, *Garnish-*

---

[8] The term "garnishment" is used interchangeably herein with attachment to connote the placing of a judicial lien upon property.

ment and Bankruptcy, 27 Minn. L. Rev. 1 (1942). As the nation developed a complex web of inter-state commercial relationships, the existence of a multiplicity of limited state jurisdictions made the use of pre-judgment garnishment a commercial necessity in order to obtain *quasi in rem* jurisdiction over foreign defendants. Cf. *Pennoyer* v. *Neff*, 95 U.S. 714 (1877).

It is not surprising, therefore, that pre-judgment garnishment became a customary and accepted mode of initiating commercial litigation against foreign defendants over whom no *in personam* jurisdiction could be secured. *Ownbey* v. *Morgan*, 256 U.S. 94 (1921). *Ownbey* is a classic example of the historical function of pre-judgment garnishment. In *Ownbey*, the plaintiff resided in Delaware and was unable to establish *in personam* jurisdiction over a Colorado defendant. However, the defendant owned property in Delaware. Plaintiff, alleging that the defendant was indebted to him, attached defendant's Delaware assets, thereby creating *quasi in rem* jurisdiction over him.[9]

In spite of the efficacy of the *Ownbey* procedure in establishing *quasi in rem* jurisdiction, the continued growth of a national commercial structure, coupled with the astonishing mobility of twentieth century American life, rendered pre-judgment garnishment inadequate as a device to assure a plaintiff's access to a convenient judicial forum. In response to the need for a more appropriate

[9] In *Ownbey*, when the Colorado defendant sought to appear and defend the action *in personam*, he was barred from doing so until security for the attached assets was filed with the court. Since Ownbey lacked the funds to obtain such security, he was not permitted to defend the action. To the extent to which the *Ownbey* decision sustains the constitutionality of depriving a defendant of his day in court because he lacks the funds to post security, it is wholly inconsistent with modern notions of due process of law and equal protection of the laws, and should be repudiated. See *infra* pp. 12-17.

and efficient procedure for obtaining jurisdiction over out of state defendants,[10] there evolved the "long arm statute", authorizing a state court to assert *in personam* jurisdiction over foreign defendants in cases arising out of transactions occurring within the forum state. See, generally, *Developments in the Law State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960); Carrington, *The Modern Utility of Quasi-in-Rem Jurisdiction*, 76 Harv. L. Rev. 303 (1962).[11] Had such a "long arm statute" existed at the time, the Delaware court in *Ownbey* would have possessed *in personam* jurisdiction without resort to pre-judgment garnishment.

What began, therefore, in the English borough courts of the Fifteenth century as a judicial device for acquiring extra-territorial jurisdiction, has evolved, under the pressures of life in contemporary American society, into an explicit legislative assertion of such jurisdiction. To the extent that the legislature has solved the jurisdictional dilemma by creating constitutionally-sufficient long arm jurisdiction, the original concept of pre-judgment garnishment has been reduced to a vestigial anachronism.[12]

---

[10] As evidenced by this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[11] See, Cleary and Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 N.W. L. Rev. 599, 603 (1955) for a review of the events leading up to the enactment of the first "long arm statute" by Illinois. Wisconsin's "long arm statute" was enacted on July 1, 1960. W.S.A. § 262.05; § 262.06. See, Note, *Personal Jurisdiction Over Non-Residents*, 1962 Wisc. L. Rev. 544 (1962) for an analysis of Wisconsin's statute. The history and development of Wisconsin's statute, together with a partial compilation of the long arm provisions of other states, is set forth in the Revision Notes to Wisc. Stat. Ann. § 262.05.

[12] Of course, if a plaintiff, in good faith, establishes that a defendant is likely to abscond during the pendency of an action, pre-judgment garnishment would, once again, play its historical role of compelling debtors to appear in court.

2. The current oppressive function of pre-judgment wage garnishment effects a denial of equal access to the courts

Since a wage earner, especially a poor wage earner, often depends upon his wages for subsistence, intolerable pressures to pay or to settle a disputed claim prior to any judicial hearing are brought to bear upon him by delaying the receipt of his wages. In addition, many wage earners fear, quite justifiably, that their jobs will be jeopardized if their employers are put to the inconvenience and expense of complying with a pre-judgment wage garnishment. Brunn, *Wage Garnishment in California,* 53 Calif. L. Rev. 1214, 1229 (1965).

Pre-judgment garnishment originated as a device to compel recalcitrant debtors to resolve their disputes in court. In modern America, however, pre-judgment wage garnishment has degenerated into a device which frustrates debtors from presenting their defenses in court. In fact, pre-judgment wage garnishment, which originated as a device to give a creditor his day in court, is now utilized as a club to coerce a poor debtor into abandoning his day in court. Patterson, *Wage Garnishment—an Extraordinary Remedy Run Amuck,* 43 Wash. L. Rev. 735 (1968); Jabonski, *Wage Garnishment as a Collection Device,* 1967 Wisc. L. Rev. 759 (1967); Comment, *Wage Garnishment in Washington—an Empirical Study,* 43 Wash. L. Rev. 742 (1968).

In effect, the existence of pre-judgment wage garnishment puts a price tag on resort to the courts. If an alleged debtor is sufficiently wealthy to afford the suspension of a portion of his wages or to risk the loss of his job, he can face his creditor with relative impunity, and resolve his dispute in court. If, however, he is dependent upon his wages for the necessities of life or views the potential loss of his job as an economic catastrophe, he

is literally at a creditor's mercy; for unless he pays up or settles, without resort to court, a substantial portion of his wages may be cut off and his livelihood imperiled.

Pre-judgment wage garnishment, therefore, stands as a pervasive restraint upon the ability of the poor to gain access to the courts. As such, it denies them equal protection of the law.

This Court has repeatedly declared that the existence of procedures which invidiously discriminate against the poor, by creating a "money hurdle" [18] which they must overcome in order to gain access to their birthright as Americans, violates the equal protection clause of the Fourteenth Amendment.

In *Edwards* v. *California*, 314 U.S. 160 (1941), this Court struck down a statute making it a crime to introduce an indigent into the State of California. Mr. Justice Douglas, in his concurring opinion, stated that the existence of such a restraint upon the right of the poor to travel freely:

> "... would ... introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity." 314 U.S. at 181.

Mr. Justice Jackson, in his concurring opinion in *Edwards*, added:

---

[18] *Griffin* v. *Illinois*, 351 U.S. 12 (1956), Frankfurter, J., concurring at p. 23.

> "We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States." 314 U.S. at 184.

In *Griffin* v. *Illinois*, 351 U.S. 12 (1956), this Court struck down a procedure whereby indigent defendants were prevented from appealing from criminal convictions by being denied free transcripts of their trials. Mr. Justice Black, writing for the Court, stated:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. . . .
>
> • • • • •
>
> ". . . our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.
>
> • • • • •
>
> "Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court." 351 U.S. at 16-17.

Mr. Justice Frankfurter, in his concurring opinion in *Griffin*, added:

> ". . . when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such review. . . .
>
> "To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. . . .

> "The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity." 351 U.S. at 23-24.

Again, in *Burns* v. *Ohio,* 360 U.S. 252 (1959), this Court struck down a procedure which prevented an indigent defendant from perfecting his appeal until he paid a $20 filing fee. The Chief Justice, writing for the Court, held:

> "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." 360 U.S. at 258.

Accord: Smith v. *Bennett,* 365 U.S. 708 (1961), involving a $4 filing fee for a habeas corpus petition ("In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws." 365 U.S. at 714).

And in *Douglas* v. *California,* 372 U.S. 353 (1963), this Court struck down a procedure whereby appellate counsel for indigent prisoners was provided only for "meritorious appeals." Mr. Justice Douglas, writing for the Court, stated:

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record . . . while the indigent . . . is forced to shift for himself." 372 U.S. at 357-358.

See also, *Anders* v. *California,* 386 U.S. 738 (1967).

In *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), this Court reversed prior contrary precedents and ruled that an in-

digent defendant in a non-capital felony case was constitutionally entitled to court appointed counsel:

> "... in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U.S. at 344.

Finally, in *Roberts* v. *LaVallee,* 389 U.S. 40 (1967), this Court, in condemning *per curiam* New York's refusal to provide an indigent defendant with a copy of the transcript of his preliminary hearing, summed up the present state of the constitutional right of equal access to the courts:

> "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." 389 U.S. at 42.[14]

The principle of equal justice for the poor enunciated by this Court in these cases would clearly invalidate any state attempt to condition access to the courts upon "the length of a person's purse." *Williams* v. *Shaffer,* 385 U.S. 1037, 1039 (1967) (Dissenting Opinion). *Simmons* v. *Housing Authority of West Haven,* No. 909 (certiorari granted April 7, 1969). Paraphrasing Mr. Justice Black in *Griffin* v. *Illinois,* 351 U.S. at 16-17, "surely no one would contend" that a state or the Federal Government could constitutionally provide that indigent persons unable to satisfy a means test should be denied the right to resort to courts for the resolution of consumer disputes.

---

[14] The Equal Protection Clause guarantees not only equal access to the courts, but also equal access to the electoral system. *Harper* v. *Virginia Board of Electors,* 383 U.S. 663 (1966). *Harper* invalidated state poll taxes because such a tax "makes the affluence of any voter or payment of any fee an electoral standard." 383 U.S. at 666.

Pre-judgment wage garnishment creates just such a means test. It stands as a formidable "money hurdle" between the poor and access to the courts. It requires no Anatole France[15] to recognize that the invidious discrimination against the poor inherent in pre-judgment wage garnishment can no longer be tolerated in an American society which pays more than lip service to equal protection of the laws.[16]

B. *Pre-Judgment Wage Garnishment Violates the Due Process Clause*

Amicus contends that contemporary pre-judgment wage garnishment must be recognized as a violation of the Equal Protection Clause. See *supra*, pp. 12-17. Pre-judgment wage garnishment is even more plainly a violation of the Due Process Clause.

It is beyond doubt that "No person may be deprived of his property without notice or hearing." *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950).

---

[15] The cases relied upon by the Court below, all more than 40 years old, relate to a completely different world than that of the persons affected by contemporary wage garnishment. *Ownbey* v. *Morgan*, 256 U.S. 94, 111 (1921) majestically observes that "a man who has property usually has friends and credit." *Coffin Brothers* v. *Bennett*, 277 U.S. 29 (1928) dealt with owners of bank stock. *McInnes* v. *McKay*, 279 U.S. 820 (1928) is bereft of a full statement of facts, but it is hard to believe that the case involved low-income debtors whose weekly wages were garnisheed.

[16] "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule." Wheeler, *J.* in *Dwy* v. *Connecticut Co.*, 89 Conn. 74, 99 (1915), quoted with approval in Cardozo, *The Nature of the Judicial Process*, 151 (Yale Paperbound ed. 1960).

Mr. Justice Jackson, writing for the Court in *Mullane,* stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313.

It is conceded that neither notice nor hearing is required by statute before the imposition of pre-judgment wage garnishment in Wisconsin. It is contended, however, that since the sequestration of wages is only temporary, because "title" does not pass, the garnishment is not really a deprivation of property. *Family Finance Corp.* v. *Sniadach, supra,* 154 N. W. 2d at 262-263. In effect, the Wisconsin Supreme Court ruled that the indefinite suspension of fifty per cent of a week's wages would not constitute a taking of property because no "title" passed.

There might have been a time in the history of this Court when the empty conceptualism inherent in such thinking would have outweighed objective reality. Fortunately, those days are gone. This Court has determined that reality, not formalistic concept, is the touchstone of constitutional decision. As Mr. Justice Frankfurter stated, concurring in *Griffin,* "[l]aw addresses itself to actualities." 351 U.S. at 23.

The stark, unalterable "actuality" of pre-judgment wage garnishment is that it deprives a wage earner of the wherewithal to secure the necessities of life without notice or hearing. The overwhelming mass of persons who endure pre-judgment wage garnishment are low-income consum-

ers. They require every penny earned, and more, to pay for basic necessities. They have no savings to rely upon. Pre-judgment wage garnishment not only works an economic hardship upon a wage earner and his family, but it may also intensify other family debt problems, leading in an inexorable spiral to repossession, default judgment and bankruptcy. Brunn, *Wage Garnishment in California*, 53 Cal. L. Rev. 1214, 1228 (1965); "The Truth About Credit", 33 CONSUMER REPORTS, 428, 430 (August 1968).

It is this "actuality", *amicus* respectfully urges, on which this Court must rule. The fact that under Wisconsin law "title" to the garnisheed wages has not passed does not, in any way, mitigate the nature of the deprivation which pre-judgment wage garnishment perpetrates upon a low-income wage earner. All the "title" in Wisconsin will not buy a week's groceries.

CONCLUSION

For the reasons set forth, the decision of the Court below should be reversed.

Respectfully submitted,

KARPATKIN, OHRENSTEIN & KARPATKIN
660 Madison Avenue
New York, New York 10021
Attorneys for Amicus Curiae

April 1969.

Of Counsel:

RHODA H. KARPATKIN
MARVIN M. KARPATKIN
BURT NEUBORNE

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW	3
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. PRE-JUDGMENT GARNISHMENT AS A MEANS OF COLLECTING JUST DEBTS	5
II. GARNISHMENT IS A LEGISLATIVE PROCESS NOT JUDICIARY	7
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:

Boynton Cab Co. v. Giese, 237 Wis. 237, 296 N.W. 630 (1941)	10

Page

Byrd v. Rector,
112 W. Va. 192, 163 S. E. 845 (1932).... 4, 12

Coffin Bros. & Co. v. Bennett,
277 US 29, 72 L. Ed. 768, 48 S. Ct. 422
(1927)..... 8

Eagleson v. Rubin,
(S. C., Ida., 1909) 100 P 765..... 11

Grannis v. Ordean,
34 S. C. 779..... 12

Henderson v. Mutual Fertilizer Company,
(S. C., Ga., 1920) 104 S. E. 229..... 11

Manufacturer's Freight Forwarding Co.,
294 Mich. 57, 292 N. W. 678, 680
(1940)..... 7

McInnes v. McKay,
141 A. 699 (1928)..... 13

Phillips v. Commissioner of Internal
Revenue, 283 US 589, 51 S. Ct. 608,
75 L. Ed. 1289 (1930)..... 10

Pierce v. Chicago & Northwestern
Railway Co., 36 Wis. 283, 287..... 11

Scholberg v. Itnyre,
264 Wis. 211, 58 N. W. 2d 648 (1952)..... 7

Skalecki v. Frederick,
31 Wis. 2d 496, 502 (1966)..... 8

Page

Standard Oil v. Superior Court of New Castle County, 44 Del. 538, 69 S. Ct. 738 8

United States v. Department of Corrections of State of Delaware, 268 F. S. 242 (1967) 13

Statutes:

Wis. Stats., Sections 267.01, 267.02, 267.05, 267.07, 267.13, 267.16, 267.18, 267.20 (1967 Pocket Part.) 2, 3

Wis. Stats., Sections 267.01; et seq. 3

Wis. Stats., 1965, 267.07 9

Wis. Stats., 1965, 267.15 - 267.16 10

Legal Encyclopedias:

16A C. J. S. Constitutional Law, Section 619, page 808 9

16 Am. Jur. 2d Constitutional Law, Section 576, page 980 10

16 Am. Jur. 2d, supra, page 981 11

16A C. J. S. Constitutional Law, Section 613, page 762 12

6 Am. Jur. 2d Attachment & Garnishment, Section 5, page 563 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968 No. 130

CHRISTINE SNIADACH,

Petitioner,

-v-

FAMILY FINANCE CORPORATION OF BAY VIEW and MILLER HARRIS INSTRUMENT COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT

OPINIONS BELOW

The order of the Milwaukee County Court of Wisconsin (R. 118-120; A. 10-11) is unreported. The memorandum decision of the Milwaukee Circuit Court of Wisconsin (R. 101-110; A. 14-23) is also unreported. The decision of the Supreme Court of Wisconsin (R. 126-148; A. 27-51) is reported at 37 Wis. 2d 163, 154 N. W. 2d 259 (1967).

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on December 8, 1967 (A. 26). Rehearing was denied on February 27, 1968 (A. 52). The petition for writ of certiorari, filed May 27, 1968, was granted February 24, 1969 (A. 54). Jurisdiction of this Court rests on 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Petitioner is a $65.00 per week wage earner. Half the wages due her were garnisheed before trial by plaintiff in a lawsuit against her. Under Wisconsin law, before petitioner's wages were garnisheed, she had no right to notice and hearing or other procedure for challenging the legality of the garnishment sought by plaintiff. The plaintiff did not have to show that without garnishment, he would be unlikely to obtain jurisdiction over petitioner or to collect a money judgment, nor did he have to show probable cause to believe that petitioner owed him any money, nor any other reason purporting to justify denial of notice and hearing. Does this procedure deny due process of law secured by the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Wis. Stats. Sections 267.01, 267.02, 267.05, 267.07, 267.13, 267.16,

267.18, 267.20 (1967 Pocket Part). They are set forth in the appendix infra, p. 1a.

STATEMENT

Petitioner Christine Sniadach is a wage earner and resident of Milwaukee, Wisconsin. Family Finance Corporation of Bay View (respondent here) is engaged in the finance and loan business. Petitioner on September 2, 1964 borrowed the sum of $1,800.00 from the respondent and as of the date of the institution of the original action, November 16, 1966, a balance of $1,500.00 was still due and owing. The garnishment commenced under Wisconsin garnishment law, Wis. Stats. Sections 267.01 et seq. (A-5-6), was for back payments only not for the entire balance. Garnishee answer revealed that $31.59 was due and owing. The claim of the principal action for $420.00 has been stayed pending the outcome of this proceeding involving the Wisconsin garnishment law.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner sought by order to show cause in the County Court to dismiss the garnishment on the ground that the Wisconsin procedure for prejudgment garnishment deprived her of due process of law under the Fourteenth Amendment to the Federal Constitution. Hearing was pending and on January 7, 1967, Judge Thaddeus Pruss of the County Court held that "the garnishment action in the instant proceedings does not violate defendant's constitutional rights under . . . the United States Constitution 14th Amendment due process and equal protection" (A. 10-11).

On appeal to the Circuit Court of Milwaukee, petitioner argued that the garnishment statute "deprives the defendant of due process of law in violation of the Fourteenth Amendment to the United States Constitution because the defendant is given no hearing before being deprived of his property." The Circuit Court affirmed on March 15, 1967, stating that "defendant's argument rejects the fact that nothing has happened to the defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff" (A. 14-23).

In the Supreme Court of Wisconsin argument was had between the petitioner and respondent and subsequently the same question of due process and equal protection was brought up and on December 8, 1967, the Supreme Court of Wisconsin affirmed the decision below holding that "Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law" (A. 27-41). The Court quoted with approval the language of Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845 (1932):

> (A) Defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon . . . Until (a final) judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp . . . (A. 35).

Two Justices of the Wisconsin Supreme Court dissented, their contention being "the test is whether he was deprived of his property" (A. 13).

SUMMARY OF ARGUMENT

Garnishment of wages of an alleged debtor prior to judgment is a legislative remedy given to creditors to enable them to collect their just debts. Such action is normally taken only after numerous requests for payment have been made. Provisions can be made with the Courts for immediate trial of the principal action, so that the debtor can have his day in Court. In numerous cases the debtor has become well educated and advised as to how to avoid paying just debts and the creditor is the one who is deprived of his monies and on numerous occasions merchandise.

If the Statute did not provide for immediate trial of the principal action, then this would constitute a denial of due process, but they are specific, in that they distinguish between the garnishment action and the principal action to afford relief to the debtor.

ARGUMENT

PRE-JUDGMENT GARNISHMENT AS A MEANS OF COLLECTING JUST DEBTS

Petitioner in her argument dwelled upon the cases of unscrupulous merchants and lenders whose practices trap the so-called "unwilling workers." Today, in a socially conscious society the pendulum is swinging to protect the consumer. The Respondent agrees that there are injustices in the garnishment and replevin attachment procedures but nothing is said about the

average creditor who in most cases does not garnishee within 10 days but only after numerous notices and requests for payment are made over a long period of time.

It appears no one is concerned with the creditor who has either advanced monies "dollar for dollar" or merchandise which is consumed or used by the debtor without regard for his obligation to repay or return the merchandise used or the monies borrowed.

In the matter before the court the account in question was delinquent in excess of 2 years before any legal action was taken.

Petitioner states that garnishment is generally the weapon of predatory creditors. In our shifting society where debtors move from day to day or week to week it is the only method by which a merchant or lender can get his money or in the case of a replevin his merchandise.

The garnishment situation involved herein reminds the Respondent of the situation when employers had the upper hand over labor organizations and employees, subsequently, legislation was passed favoring labor. It appears now that there is an attempt to bring the equality between labor and management so that both parties will have equal rights and equal protection.

With the forthcoming Uniform Consumer Credit Code the consumer is getting needed protection and with the passage of the Consumer Credit Protection Act a debtor will be receiving needed and long overdue protection. In both instances, these are actions of the legislature and not the judiciary.

In the case before the Court, Answer was filed in this matter on December 16, 1966. Defendant could have requested the Court for immediate trial on her Answer and the Court would have, under its policy, scheduled the matter for hearing.

The only deprivation was caused by the defendant herself and not by any statutory claim or by the Court.

It is not denied that collection of delinquent accounts is highly systemized, in fact, it must be so in order to effectively obtain a return of the money lent.

What petitioner suggests appears to be that since the creditors have more money than the debtors, the creditors should bear the loss and the debtor should go "scot free".

GARNISHMENT IS A LEGISLATIVE PROCESS NOT JUDICIARY

Garnishment procedure is essentially an issue of the Legislature and not of the Judiciary. In common law the remedy of garnishment was not known and as in our laws remedy is a creature of the Legislature. There is a clear distinction between legislative and Judicial acts. The Legislature makes the law; the courts apply it, In re Manufacturer's Freight Forwarding Co., 294 Mich. 57, 292 N.W. 678, 680 (1940), and also Scholberg vs. Itnyre, 264 Wis. 211, 58 N.W. 2d 648 (1952).

The before judgment garnishment statutes are a creature of the Legislature and a new right given to the creditor to pursue his remedy.

In Coffin Bros. & Co. v. Bennett, 277 US 29, 72 L. Ed. 768, 48 S. Ct. 422 (1927) at page 769, Justice Holmes states:

> "...nothing is more common than to allow parties alleging themselves to be creditors to establish by attachment a lien dependent upon the result of the suit."

Skalecki v. Frederick, 31 Wis. 2d 496, 502 (1966) recognized the right of the Legislature to create such a remedy when it states:

> "The general rule is that in absence of statutory authorization garnishment will not lie since it was unknown to the common law and it is completely statutory."

This was further set forth in Standard Oil v. Superior Court of New Castle County, 44 Del. 538, 69 S. Ct. 738 holds:

> "A state may by appropriate legislation authorize attachment or garnishment of property within its borders subject to the limitations of the federal and state constitutions."

Respondent contends that the court is acting outside its function when it takes to changing a creature of the Legislature by judicial process.

II.

Employees, or garnishee defendants are not deprived of their rights under the Due Process Clause.

Wisconsin Statutes 1965, 267.07 says in part:

> "...notice of such service (service on the garnishee) in substantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal-defendant as required for the exercise of personal jurisdiction under Ch. 262 not later than 10 days after the service on the garnishee as provided in s. 262.06."

The Petitioner must agree that under the above statute notice is given the principal-defendant as required by due process. The Petitioner argued that she had no notice until after the property was seized. The answer to this is that no one finds out anything until after it happens. The Appellant argued that she should be notified prior to the notice being served upon the garnishee. The Respondent answered that due process requires only notice. It knows of no authority that requires notice be given at a particular time. Due process simply requires notice sufficient to allow the principal-defendant to appear and defend.

16A C. J. S. Constitutional Law, Section 619, page 808 states:

> "...it is held that mere seizure of his property, as in attachment or garnishment proceedings constitutes sufficient notice."

The second requirement of due process is that there be a hearing to determine the liability

of the parties. The Respondent submits that this requirement is met by the statutes questioned.

Wis. Stat. 1965 267.16 provides for a determination of liability in the principal action but 267.15 also allows for a judicial hearing in the matter of the garnishment itself. This statute allows the principal-defendant to defend again.

Phillips v. Commissioner of Internal Revenue, 283 US 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1930) states:

> "Where only property rights are involved, MERE POSTPONEMENT OF THE JUDICIAL INQUIRY IS NOT A DENIAL OF DUE PROCESS, if the opportunity given for the ultimate judicial determination of the liabilities is adequate."

16 Am. Jur. 2d Constitutional Law, Section 576, page 980, states:

> "A party must not be deprived of his property without a judicial hearing, but the stage of proceedings at which the hearing shall take place and the manner in which the cause of the party shall be brought before the judicial tribunal, provided it is not an unreasonably inconvenient and embarrassing one, are within the legislative power.
>
> Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered."

This last principle was upheld in Boynton Cab Co. v. Giese, 237 Wis. 237, 296 N.W. 630 (1941).

16 Am. Jur. 2d, supra, page 981 states:

> "From the foregoing it follows, that although it is the general rule that everyone is entitled to a hearing as an essential part of due process of law, a statute is not merely unconstitutional because it authorizes a ministerial act by which possession of property is taken before the right to it has been judicially determined."

The petitioner argued that the creditor has not opportunity for hearing. The Respondent asserts that because there is not an early hearing the principal-defendant cannot plead his exemptions. In Pierce v. Chicago & Northwestern Railway Co., 36 Wis. 283, 287 states:

> "...if the garnishee knows that the property, money or indebtedness in his possession or under his control, is exempt, it is his duty for self protection, to bring that fact to the notice of the court."

In fact, the creditor, by proper pleadings could have petitioned the court for an immediate trial which has in the past and at the present time been normally granted by the courts. In the case of Henderson v. Mutual Fertilizer Company (S. C., Ga., 1920) 104 S. E. 229, the court held that the garnishment process was not a deprivation of due process of law or of the equal protection of law as guaranteed by the Constitution of Georgia or the United States.

In Eagleson vs. Rubin (S. C., Ida., 1909), 100P 765 it was held that "Due Process of Law"

as used in the Constitution of Idaho and the United States as applied to judicial proceedings means that every litigant shall have the right to have his cause tried and determined under the rules of procedure, the same as applied to other similar cases; and when this is afforded him, a defendant cannot claim that due process of law is not being observed.

(Also See: Grannis vs. Ordean, 34 S. C. 779)

Not only do the Wisconsin Statutes meet the due process requirements and provide sufficient protections, statutes of this type have been upheld.

16A C. J. S. Constitutional Law, Section 613, page 762 states:

"Particular provisional remedies which have been held as not denying due process under the circumstances include . . . garnishment. . . ."

6 Am. Jur. 2d Attachment & Garnishment, Section 5, page 563 states:

"An attachment or garnishment is not a deprivation of property without due process of law within the meaning of constitutional provisions, inasmuch as there must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim."

The leading case in this area is Byrd v. Rector, 163 S. E. 845, 81 A. L. R. 1213, 1216 (1932), wherein a garnishment before judgment statute was questioned, the court there said:

> "We think the answer to these propositions is that the defendant is not deprived of his property by reason of the levy of the copy of the attachment upon a person who is indebted to him or who has effects belonging to the defendant. The most that such procedure does is to deprive the defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process."

In McInnes v. McKay, 141 A. 699 (1928), wherein a statute like the one herein questioned was being questioned, the court there stated:

> "...it is not a deprivation without due process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied."

The respondent submits that due process is met by the statutes questioned because notice and opportunity for a hearing are present and that further protections are present to secure the debtor's rights.

The more recent case United States v. Department of Corrections of State of Delaware, 268 F.S. 242 (1967) answering the question of

the posting of a bond, the petitioner argued that there was a violation of the Equal Protection Law Clause inasmuch as a person similarly charged with one offense who could post bond, would avoid any further police interrogation while he, as one unable to meet bond requirements, was not given equal protection of the law with one who could make bail. The court there was not given equal protection of the law. In that case the court stated, "a state can, consistently with the 14th amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination'. Absolute equality is not required; lines can be and are drawn and we ought to sustain them."

CONCLUSION

Respondent admits that the Garnishment Laws are in need of revision, however, submits that garnishment, being a creature of the Legislature, must be changed by legislative action and not by the judiciary.

Adequate safeguards for immediate hearing are available and but for the petitioners delay, the principal action and the accompanying garnishment could have been disposed of.

The deprivation as referred to by the petitioner is, in reality, a two-edged sword, in that by favoring the wage earner, the creditors are being jeopardized by not receiving their legal due, to wit: money or goods, to which they are entitled.

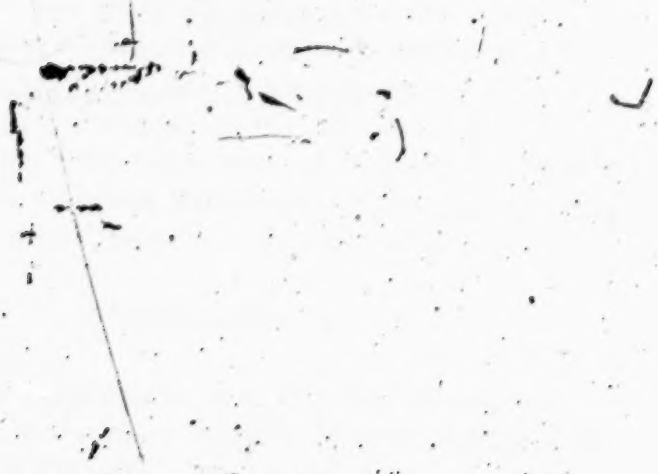
Therefore, in this instance, the judgment as entered should be allowed to stand.

Respectfully submitted,

SHELDON D. FRANK

SIDNEY GRAY
Of Counsel

Attorneys for Respondent



APPENDIX

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes of the State of Wisconsin:

(a) Wis. Stat. § 267.01 (1967 Pocket Part)

(1) Any creditor may proceed against any person who is indebted to or has any property in his possession or under his control belonging to such creditor's debtor, as prescribed in this chapter. "Plaintiff" as used in this chapter includes a judgment creditor and "defendant", a judgment debtor.

(2) Except as otherwise provided in this chapter, the procedure in garnishment actions shall be the same as in ordinary civil actions.

(2a) A garnishment action is a separate action.

(3) An individual may commence a garnishment action in his own person and in his own behalf, or by an attorney licensed to practice in the courts of this state, but not otherwise. Garnishment actions on behalf of any other party shall be commenced only by attorneys licensed to practice in the courts of this state.

(4) No garnishment action shall be brought to recover the price or value of spirituous, malt, ardent or intoxicating liquors sold at retail.

(b) Wis. Stat. § 267.02 (1967 Pocket Part)

(1) A plaintiff may commence a garnishment action at any time after:

(a) A summons is issued: 1. In an action for damages founded upon contract, express or implied (or in a contract action where a writ of attachment could issue on demands not yet due under s. 266.03(3)). 2. In an action upon a judgment. 3. In a tort action where a writ of attachment could issue under s. 266.03(2).

(b) An execution upon an in personam judgment is issuable.

(2) If wages or salary are the subject of a garnishment action, and payment of wages or salary to the defendant is, has been, or should be, withheld therein, plaintiff may not commence any other garnishment action affecting the wages or salary of the principal defendant prior to judgment in the principal action.

(3) Except as provided in sub. (2), the plaintiff may, in like manner, subsequently proceed against other garnishees, or, if he has reason to believe they have subsequently become liable, against the same garnishee.

(c) Wis. Stat. § 267.04 (1967 Pocket Part)

(1) Upon payment to the clerk of a clerk's fee of $2 and a suit tax of $1, the clerk shall issue a garnishee summons together with

sufficient copies to the plaintiff or his attorney; the summons form may be in blank, but must carry the court seal.

(c) Wis. Stat. § 267.05 (1967 Pocket Part)

(1) The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in s. 267.02(1)(a), the amount of the plaintiff's claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is, to the best of plaintiff's knowledge and belief, not exempt from execution.

(d) Wis. Stat. § 267.07 (1967 Pocket Part)

(1) Except as provided in s. 267.05(4), the garnishee summons and complaint shall be served on the garnishee as required for the exercise of personal jurisdiction under ch. 262, and notice of such service in substantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal defendant as required for the exercise of personal jurisdiction under ch. 262, not later than 10 days after service on the garnishee as provided in s. 262.06.

(e) Wis. Stat. § 267.13 (1967 Pocket Part)

(1) If the answer shows a debt due to the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, as stated in the garnishee complaint, with interest and costs, to the clerk of the court. If prior to so doing, the plaintiff in writing requests the garnishee to pay such sum to such clerk, the garnishee shall, within 5 days after receipt of such request, pay the sum to the clerk. The clerk shall give his receipt therefor to the garnishee. Such payment shall discharge the garnishee of all liability for the amount so paid.

(2) If the debt disclosed is not due, this section shall apply when it becomes due, with like effect.

(3) If the garnishee fails to pay such sum within 5 days after receipt of such request, the plaintiff shall be entitled to judgment against the garnishee for the amount disclosed, when due, either before or after judgment in the original action and may collect the same by execution; but in case no judgment has been rendered in the principal action the execution against the garnishee shall require the sheriff to pay the money collected into court to abide the event of the principal action. Moneys paid into court shall be paid to the plaintiff when final judgment is rendered in his favor, and to the extent of satisfying the same, upon order of the court, and any balance to the party entitled thereto.

(4) If no such request is made and the garnishee does not elect to pay such sum to the clerk, the garnishee shall hold the same until order of the court. No stipulation between the plaintiff and the defendant shall be honored by the garnishee, until signed and approved by the court.

(5) If judgment is against the plaintiff such moneys shall be paid to the defendant.

(f) Wis. Stat. § 267.16 (1967 Pocket Part)

(1) No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs.

(2) The court may adjudge the recovery of any debt, the conveyance, transfer or delivery to the sheriff or any officer appointed by the judgment of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand; or by the judgment pass the title thereto; and may therein or by its order direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid or delivered to the clerk or officer. The judgment against a garnishee shall discharge him from all demands by the defendant for all property paid, delivered or accounted for by the garnishee, by force of such judgment.

(g) Wis. Stat. § 267.18 (1967 Pocket Part)

(1) From the time of the service of the summons and complaint upon the garnishee he shall stand liable to the plaintiff for the property then in his possession or under his control belonging to the defendant or in which he is interested to the extent of his right or interest therein and for all his debts due or to become due to the defendant, except such as are exempt from execution, but not in excess of the amount of the plaintiff's claims as disclosed by his garnishee complaint together with 25 per cent of the amount claimed in the garnishee complaint but not less than $25 nor more than $500 to secure costs.

(2) (a) When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

(b) If the court determines that the principal defendant is entitled to an exemption in excess of the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be set off and applied against said exemption.

If the court determines that the principal defendant is entitled to an exemption less than the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be the exemption to which the principal defendant is entitled in such garnishment action.

(h) Wis. Stat. 267.20 (1967 Pocket Part)

Except upon the order of a judge no action shall be commenced by the defendant or his assignee against a garnishee upon any garnished claim or demand or to recover any property garnished, or execution be issued upon a judgment in favor of defendant against such garnishee, until the termination of the garnishment; and if an action has been commenced or an execution issued it shall be stayed by the court or a judge thereof as to the garnishee upon his application.

INDEX TO APPENDIX

Page

STATUTORY PROVISIONS INVOLVED..... 1a

SUPREME COURT OF THE UNITED STATES

No. 130.—October Term, 1968.

Christine Sniadach, Petitioner, v. Family Finance Corporation of Bay View et al. | On Writ of Certiorari to the Supreme Court of Wisconsin.

[June 9, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent instituted a garnishment action against petitioner as defendant and Miller Harris Instrument Co., as her employer, as garnishee. The complaint alleged a claim of $420 on a promisory note. The garnishee filed its answer stating it had wages of $63.18 under its control earned by petitioner and unpaid, and that it would pay one-half to petitioner as a subsistence allowance [1] and hold the other half subject to the order of the court.

Petitioner moved that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment. The Wisconsin Supreme Court sustained the lower state court in approving the procedure. 37 Wis. 2d 163, 154 N. W. 2d 259. The case is here on a petition for a writ of certiorari. 393 U. S. 1078.

[1] Wis. Stat. § 267.18 (2)(a) provides:

"When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50% of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action."

The Wisconsin statute gives a plaintiff 10 days in which to serve the summons and complaint on the defendant after service on the garnishee.[2] In this case petitioner was served the same day as the garnishee. She nonetheless claims that the Wisconsin garnishment procedure violates that due process required by the Fourteenth Amendment, in that notice and an opportunity to be heard are not given before the *in rem* seizure of the wages. What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen.[3] They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.

Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. *Fahey* v. *Mallonee*, 332 U. S. 245, 253–254; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594, 598–600; *Ownbey* v. *Morgan*, 256 U. S. 94, 110–112; *Coffin Bros.* v. *Bennett*, 277 U. S. 29, 31. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable.

The question is not whether the Wisconsin law is a wise law or unwise law. Our concern is not what phi-

[2] Wis. Stat. § 267.07 (1).

[3] Wis. Stat. § 267.04 (1).

losophy Wisconsin should or should not embrace. See *Green* v. *Frazier*, 253 U. S. 233. We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and again with the question of what constitutes "the right to be heard" (*Schroeder* v. *New York*, 371 U. S. 208, 212) within the meaning of procedural due process. See *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314. In the latter case we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U. S., at 314. In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

A procedural rule that may satisfy due process for attachments in general, see *McKay* v. *McInnes*, 279 U. S. 820, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. Until a recent Act of Congress,[4] § 304 of which forbids discharge of employees on the ground that their wages have been garnisheed, garnishment often meant the loss of a job. Over and

[4] 82 Stat. 146, Act of May 29, 1968.

beyond that was the great drain on family income. As stated by Congressman Reuss: [5]

> "The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level."

Recent investigations of the problem have disclosed the grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking. Congressman Sullivan, Chairman of the House Subcommittee on Consumer Affairs who held extensive hearings on this and related problems stated:

> "What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in any easy credit nightmare in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." 114 Cong. Rec. p. H 688 (1968).

The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by its attorneys in the garnishment proceedings:

> "The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'pay-

[5] 114 Cong. Rec., p. H 688 (1968).

ment schedule' which incorporates these additional charges." [6]

Apart from those collateral consequences, it appears that in Wisconsin the statutory exemption granted the wage earner [7] is "generally insufficient to support the debtor for any one week." [8]

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall.[9] Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

Reversed.

---

[6] Comment, Wage Garnishment in Washington—an Empirical Study, 43 Wash. L. Rev. 742, 753 (1968). And see comment, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759.

[7] See n. 1, *supra*.

[8] Comment, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759, 767.

[9] "For a poor man—and whoever heard of the wage of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy, and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense in such a process?" Congressman Gonzales, 114 Cong. Rec., p. H 690 (1968). For the impact of garnishment on personal bankruptcies see H. R. Rep. No. 1040, 90th Cong., 1st Sess., pp. 20-21.

SUPREME COURT OF THE UNITED STATES

No. 130.—October Term, 1968.

Christine Sniadach, Petitioner,
v.
Family Finance Corporation of Bay View et al.

On Writ of Certiorari to the Supreme Court of Wisconsin.

[June 9, 1969.]

Mr. Justice Harlan, concurring.

Particularly in light of my Brother Black's dissent, I think it not amiss for me to make explicit the precise basis on which I join the Court's opinion. The "property" of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requisites of procedural due process: notice and a prior hearing.

The rejoinder which this statement of position has drawn from my Brother Black prompts an additional word. His and my divergence in this case rests, I think, upon a basic difference over whether the Due Process Clause of the Fourteenth Amendment limits state action by norms of "fundamental fairness" whose content in any given instance is to be judicially derived not alone, as my colleague believes it should be, from the specifics of the Constitution, but also, as I believe, from concepts which are part of the Anglo-American legal heritage—not, as my Brother Black continues to insist, from the mere predilections of individual judges.

From my standpoint, I do not consider that the requirements of "notice" and "hearing" are satisfied by the

fact that the petitioner was advised of the garnishment simultaneously with the garnishee, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. Compare the majority and dissenting opinions in the Wisconsin Supreme Court, 37 Wis. 2d 163, 178, 154 N. W. 2d 259, 267 (1967). Apart from special situations, some of which are referred to in this Court's opinion, see *ante*, at 2, I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court. See, *e. g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950); *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–153 (1941); *United States* v. *Illinois Cent. R. Co.*, 291 U. S. 457, 463 (1934); *Londoner* v. *City & County of Denver*, 210 U. S. 373, 385–386 (1908).* And I am quite unwilling to take the unexplicated *per curiam* in *McKay* v. *McInnes*, 279 U. S. 820 (1928), as vitiating or diluting these essential elements of due process.

*There are other decisions to the effect that one may be deprived of property by summary administrative action taken before hearing when such action is essential to protect a vital governmental interest. See, *e. g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950); *Fahey* v. *Mallonee*, 332 U. S. 245 (1947); *Bowles* v. *Willingham*, 321 U. S. 503 (1944); *North Amer. Cold Storage Co.* v. *City of Chicago*, 211 U. S. 306 (1908). However, no such justification has been advanced in behalf of Wisconsin's garnishment law.

SUPREME COURT OF THE UNITED STATES

No. 130.—October Term, 1968.

Christine Sniadach, Petitioner,
v.
Family Finance Corporation of Bay View et al.

On Writ of Certiorari to the Supreme Court of Wisconsin.

[June 9, 1969.]

Mr. Justice Black, dissenting.

The Court here holds unconstitutional a Wisconsin statute permitting garnishment before a judgment has been obtained against the principal debtor. The law, however, requires that notice be given to the principal debtor and authorizes him to present all of his legal defenses at the regular hearing and trial of the case. The Wisconsin law is said to violate the "fundamental principles of due process." Of course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, shows why it strikes down this state law. It is because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make. The Court shows it believes the garnishment policy to be a "'most inhumane doctrine'"; that it "'compels the wage earner, trying to keep his family together, to be driven below the poverty level'"; that "'in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in any easy credit nightmare in which he is charged double for something he could not pay for, even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides.'"

The foregoing emotional rhetoric might be very appropriate for Congressmen to make against some phases of garnishment laws. Indeed, the quoted statements were made by Congressmen during a debate over a proposed federal garnishment law. The arguments would also be appropriate for Wisconsin's legislators to make against that State's garnishment laws. But made in a Court opinion, holding Wisconsin's law unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws shall be. There is not one word in our Federal Constitution or of any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority thus to try to supplement or strike down the State's selection of its own policies. The Wisconsin law is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight. Arguments can be made for outlawing loan sharks and installment sales companies but such a decision, I think, should be made by state and federal legislators, and not by this Court.

This brings me to the short concurring opinion of my Brother HARLAN, which makes "explicit the precise basis" on which he joins the Court's opinion. That basis is:

> "The 'property' of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requests of procedural due process: notice and a prior hearing."

Every argument implicit in this summary statement of my Brother HARLAN's views has been, in my judgment, satisfactorily answered in the opinion of the Supreme Court of Wisconsin in this case—an outstanding opinion on constitutional law.: 37 Wis. 2d 163, 154 N. W. 2d 259. That opinion shows that petitioner was not required to wait until the "culmination of the main suit," that is, the suit between the creditor and the petitioner. In fact the case now before us was not a final determination of the merits of that controversy but was, in accordance with well-established state court procedure, the result of a motion made by the petitioner to dismiss the garnishment proceedings. With reference to my Brother HARLAN's statement that petitioner's deprivation could not be characterized as *de minimis*, it is pertinent to note that the garnishment was served on her and her employer on the same day, November 21, 1966, that she, without waiting for a trial on the merits, filed a motion to dismiss the garnishment on December 23, 1966, which motion was denied by the Circuit Court on April 18, 1967, and it is that judgment which is before us today. The amount of her wages held up by the garnishment was $31.59. The amount of interest on the wages withheld even if computed at 10% annually would have been less than $3. Whether that would be classified as *de minimus* I do not know and in fact it is not material to know for the decision of this case.

In the motion to dismiss, petitioner, according to the Supreme Court of Wisconsin, asserted a "number of grounds based on injuries and deprivations which have been or are likely to be suffered by others but which she has not personally experienced." 37 Wis. 2d 163, 154 N. W. 2d 159. The court went further and pointed out that under Wisconsin law the court would not strike down a law as unconstitutional on the ground that some

person other than the challenger of that law might in the future be injured by its unconstitutional part. It would seem, therefore, that the great number of our cases holding that we do not determine the constitutionality of state statutes where the judgment on them was based on state law would prevent our passing on this case at all.

The indebtedness of petitioner was evidenced by a promissory note, but petitioner's affidavit in support of the motion to dismiss, according to the Wisconsin Supreme Court contained no allegation that she is not indebted thereon to the plaintiff. Of course if it had alleged that, or if it had shown in some other way that this was not a good-faith lawsuit against her, the Wisconsin opinion shows that this could have disposed of the whole case on the summary motion.

Another ground of unconstitutionality, according to the state court, was that the Act permitted a defendant to post a bond and secure the release of garnished property and that this provision denied equal protection of the law "to persons of low income." With reference to this ground, the Wisconsin court said:

> "Appellant has made no showing that she is a person of low income and unable to post a bond." 37 Wis. 2d, at 167, 154 N. W. 2d, at 261.

Another ground of unconstitutionality urged was that since many employers discharged garnished employees for being unreliable, the law threatened the gainful employment of many wageearners. This contention the Supreme Court of Wisconsin satisfactorily answered by saying that appellant had "made no showing that her own employer reacted in this manner."

Another ground challenging the state act was that it affords 10 days' time to a plaintiff to serve the garnishee summons and complaint on the defendant after service of the summons on the garnishee. This, of course, she

could not raise. The Court's answer to this was that appellant was served on the same day as the garnishee.

The state court then pointed out that the garnishment proceedings did not involve "any final determination of the title to a defendant's property but merely reserved the status quo thereof pending determination of the principal action." 37 Wis. 2d, at 169, 154 N. W. 2d, at 262. The court then relied on *McInnes* v. *McKay*, 127 Me. 110. That suit related to a Maine attachment law which, of course, is governed by the same rule as garnishment law. See "garnishment," Bouvier's Law Dictionary; see also *Pennoyer* v. *Neff*, 95 U. S. 714. The Maine law was subjected to practically the same challenges that Brother HARLAN and the Court raise against this Wisconsin law. About that law the Supreme Court of Maine said:

> "But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied." 127 Me. 110, 116.

This Court did not even consider the challenge to the Maine law worthy of a Court opinion but affirmed it in a *per curiam* opinion, 279 U. S. 830, on the authority of two prior decisions of this Court. See also *Standard Oil Co.* v. *Superior Court of New Castle County*, 44 Del.

538, 62 A. 2d 454, appeal dismissed, 336 U. S. 930; *Harris* v. *Balk*, 198 U. S. 215, 222, 227–228.

The Supreme Court of Wisconsin, in upholding the constitutionality of its law also cited a statement of our Court made in *Rothschild* v. *Knight*, 184 U. S. 334, 341, stating:

> "[T]o what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide . . . ."

Accord, *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 193.

The Supreme Court of Wisconsin properly pointed out:

> "The ability to place a lien upon a man's property such as to temporarily deprive him of its beneficial use without judicial determination of proper cause dates back not only to medieval England but also to Roman times." 37 Wis. 2d, at 171, 154 N. W. 2d, at 264.

The State Supreme Court then went on to point out a statement made by Mr. Justice Holmes in *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31:

> "The Fourteenth Amendment, itself a historical product, did not destroy for the states and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a stronger case for the Fourteenth Amendment to effect it, as is well illustrated by *Ownbey* v. *Morgan*, 256 U. S. 94, 104, 112."

The *Ownbey* case was one of the two cited by this Court in its *per curiam* opinion affirmance of *McInnes* v. *McKay*, *supra*, sustaining the constitutionality of a Delaware attachment law. And see *Byrd* v. *Rector*, 112 W. Va. 192, 163 S. E. 845.

I can only conclude that the Court is today overruling a number of its own decisions and abandoning the legal customs and practices in this country with reference to attachments and garnishments wholly on the ground that the garnishment laws of this kind are based on unwise policies of government which might some time in the future do injury to some individuals. In the first sentence of the argument in her brief, petitioner urges that this Wisconsin law "is contrary to public policy"; the Court apparently finds that a sufficient basis for holding it unconstitutional. This holding savors too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional for me to agree to the decision. See my dissent in *Adamson* v. *California*, 332 U. S. 46, 68.

ADDENDUM.

The latest statement by my Brother HARLAN on the power of this Court under the Due Process Clause to hold laws unconstitutional on the ground of the Justices' view of "fundamental fairness" makes it necessary for me to add a few words in order that the differences between us be made absolutely clear. He now says that the Court's idea of "fundamental fairness" is derived "not alone . . . from the specifics of the Constitution, but also . . . from concepts which are part of the Anglo-American legal heritage." This view is consistent with that expressed by Mr. Jutice Frankfurter in *Rochin* v. *California* that due process was to be determined by "those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ." 342 U. S. 165, 169. In any event, my Brother HARLAN'S "Anglo-American legal heritage" is no more definite than the "notions of justice of English-speaking peoples" or the shock-the-conscience test. All of these so-called tests represent nothing more nor less than an implicit adop-

tion of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means. These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair. If the judges, in deciding whether laws are constitutional, are to be left only to the admonitions of their own consciences, why was it that the Founders gave us a written Constitution at all?